Supreme Court U. S.
FILED
NOV. 11 1889
JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1889.

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, APPELLANT,

versus

JOHN A. BUCKNER,

IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSE KEENE AND MATHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLEES.

No. 135.

JOHN A. BUCKNER AND OTHERS, APPELLEES.

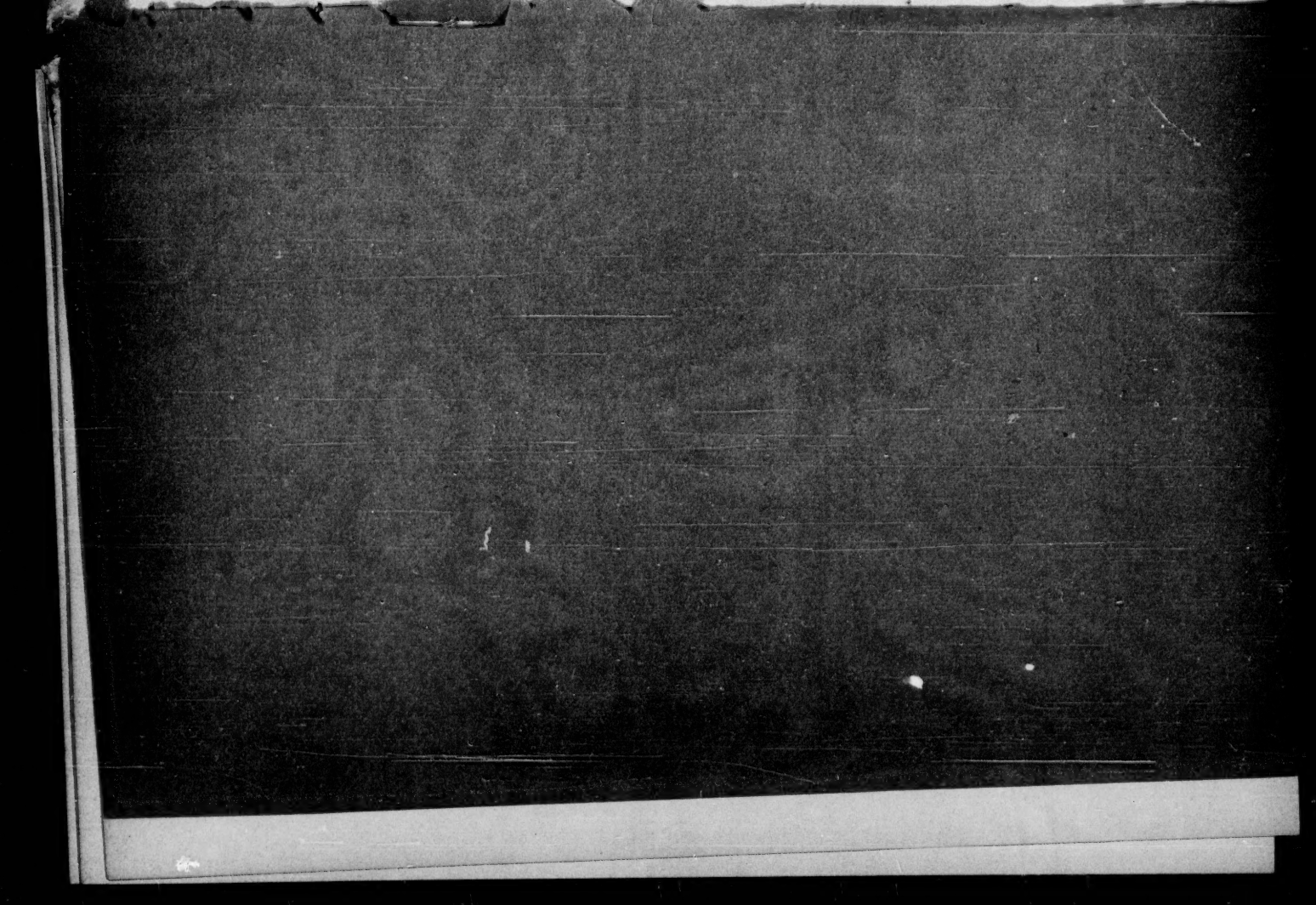
versus

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, APPELLEE.

No. 269.

THOS. J. SEMMES,
of Counsel for the Heirs of Julia Morgan.

A. W. Hyatt, Printer and Stationer, 73 Camp st., N. O.—47339



Supreme Court of the United States.

OCTOBER TERM, 1889.

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, APPELLANT,

versus

JOHN A. BUCKNER,

IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSE KEENE AND MATHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLEES.

No. 135.

JOHN A. BUCKNER AND OTHERS, APPELLEES,

versus

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, APPELLEE.

No. 269.

The appellees in No. 135 are the appellants in No. 269.

In the circuit court John A. Buckner, for himself and as tutor of his child Etheline, filed a bill separate from that filed by Narcisse Keene and Julia H. Johnson. The two suits were consolidated by agreement. Page 31.

In this court I represent only Mrs. Narcisse Keene and Mrs. Mrs. Julia H. Johnson, daughters of Julia Morgan, who are appellees in suit No. 135 and appellants in the cross appeal in suit No. 269. The two bills—that of Buckner and that of Narcisse Keene and Julia H. Johnson—were filed by leave of the court. Page 36. To these bills defendants demurred for want of equity and for want of proper parties. The objection as to parties was removed by the appearance of the executors of Oliver J. Morgan and the stipulation entered into to consolidate the causes. Page 31. The demurrer for want of equity was overruled. After the the transcript of appeal was filed Julia H. Johnson died. Her husband, George G. Johnson, has been made a party in the double capacity of administrator with the will annexed and sole universal legatee of his deceased wife's will.

I.

This suit is a sequel of the suit of Stephenson Waters, administrator of William Gay, vs. Oliver T. Morgan, John A. Buckner, F. M. Goodrich, Edward Sparrow and West Montgomery, instituted in the circuit court 24th January, 1872, and finally decided in this court at the October term, 1885. It is reported under the name of Johnson vs. Waters, 111 U. S. 640.

Mrs. Narcisse Keene, wife of Mat. F. Johnson, and Mrs. Julia H. Johnson, wife of George G. Johnson, were not parties to the suit of Gay's administrator, nor were they in any manner represented therein. The parties to that suit were the executor of Oliver J. Morgan and John A. Buckner, Goodrich, Sparrow and West Montgomery, the purchasers of the property at the probate sale in 1869. When the suit commenced in 1872 Oliver T. Morgan was the executor of Oliver J. Morgan. At that time his wife, Julia Morgan, was dead, and the interest of her children was not represented by him in his capacity of executor of Oliver J. Morgan. The interests of the children of Julia Morgan were

adverse to those of the estate of their grandfather. Besides, Oliver T. Morgan was the stepfather of Mrs. Narcisse Keene and was not the tutor of his own child, born of his marriage with Julia Morgan. He never appeared in the suit, nor was he cited in any other capacity than that of executor of Oliver J. Morgan. But Oliver T. Morgan died in 1873 (p. 90, exhibit), and Mathew F. Johnson, the husband of the complainant, Narcisse Keene, was made a party defendant in his capacity as *dative testamentary executor of Oliver J. Morgan.* His wife not being a party to the suit, and her interests being adverse to those of the succession of Oliver J. Morgan, no decree against him as executor of Oliver J. Morgan could bind or affect the adverse interests of his wife.

Some expressions are made in the opinion of the court delivered in the case of Johnson vs. Waters, 111 U. S., prejudicial to the rights of Narcisse Keene and Julia H. Morgan, as asserted in their bill of complaint; hence when the decree was remitted to the circuit court for execution, they filed the present bill as an original bill in the nature of a supplemental bill and in the nature of a cross-bill. Before doing so they obtained the leave of the court, and also permission to claim, in the alternative, either as owners of the property in question or as creditors of their grandfather's estate. Pages 36–7.

II.

Narcisse Deeson, wife of Oliver J. Morgan, died in 1844, leaving two children her sole heirs, to-wit: Ann Morgan and Julia Morgan. On the death of Narcisse Deeson all the property then owned by her husband, Oliver J. Morgan, was community property and consisted of many valuable lands, among which were certain plantations called, in the suit of Johnson vs. Waters, "Albion," "Wilton," "Morgana," "Melbourne" and "Westland."

On the demise of Narcisse Deeson the title to one-half of this property vested in her two children, Ann and Julia, as her sole heirs, subject, however, to a life estate, or usufruct, reserved by law to their father, Oliver J. Morgan.

In the year 1857 Oliver J. Morgan sued his children for a partition. The suit resulted in a decree for a sale of the property. The father became the purchaser at the judicial sale on July 18, 1858, and on a settlement had with his children it was ascertained that he was indebted to each child in the sum of $67,495.60.

On March 9, 1858, Oliver J. Morgan executed in favor of his daughter, Julia, at that time the wife of his nephew, Oliver T. Morgan, an act of sale and donation, which embraced all the plantations above enumerated, exeept "Melbourne," which he had given to Ann Morgan's husband, Oliver H. Kelham, some years before. At the time of this act of sale and donation Ann Morgan was dead, and her interest in the succession of her mother had become vested in her grandson, Oliver H. Kelham, Jr. But with that interest I have no concern, as I represent only the heirs of Julia Morgan. This act of sale and donation was executed, as I have said, on March 9, 1858, and was duly recorded in the office of the parish recorder on the 15th of March, 1858. Pp. 58-62 of exhibit.

This act recites the partition proceedings and the debt of $67,495.70 due, by the grantor to his daughter, Julia, as her share of the price realized at the partition sale. It then proceeds as follows:

"Now, for the purpose of paying to the said Julia Morgan, wife of Oliver T. Morgan, * * * the said sum of $67,495.70, due as aforesaid, and at the same time to divide the entire landed estate of this appearer, as well as that purchased by him at the sale aforesaid, as all his other lands, so as to give to the said Julia Morgan, wife of the said Oliver T. Morgan, three-fourths of his landed estate, and to the said Oliver H. Kelham one-fourth, in the event that said Oliver H. Kelham survives this appearer, after *paying each of said heirs in lands*, according to the

estimate put upon the portions which may be conveyed to each, this appearer makes this act of sale and donation unto the said Julia Morgan of the following lands and for the amounts of the estimated value *beyond the extinguishment of the debt* aforesaid, towit: $67,495.07, this act is a donation of the lands hereinafter described unto the said Julia Morgan and her heirs forever." Page 589, exhibit.

The act continues thus: "The estimated amount of the lands hereby conveyed and donated exceeds the amount of the debt due the said Julia Morgan to the amount of $236,758.52. To the extent that it exceeds three-fourths of the estimated value of the entire landed estate of this appearer, *after* the extinguishment of the debt aforesaid, she is to pay over to the minor, Oliver H. Kelham, in the event that he survives this appearer, towit: the sum of $9533.72, it taking this amount to make up one-fourth of the lands, upon the estimate now made intended for the said Oliver H. Kelham in extinguishment for the debt due him, and beyond this payment of the debt, it being intended that he should have the estimated value of one-fourth of the lands of this appearer; it being the intention of this appearer that the said Julia Morgan should have beyond, the portion that she would inherit as an heir, all the portion that this appearer could dispose of, so that his other grandchildren may get as near as may be a portion equal to that which may fall to the said Oliver H. Kelham, as a forced heir to this appearer. It is further understood that the execution of this deed, in the extinguishment of the said debt, due to said Julia Morgan, and this act of donation, made for the purpose of effecting a division of his lands, and giving to the said Julia Morgan one-fourth of the entire lands beyond the portion she would inherit as a joint heir with the said Oliver H. Kelham, is not to interfere with the rights of this appearer as a usufructuary. He is to retain possession of all the property herein conveyed and donated, with the revenues arising therefrom, until his death." Page 60, exhibit.

The following addenda were made just before signing:

"*Addenda.*—It is understood that the reservation of the rights of O. J. Morgan, as usufructuary, is, as to the *legal usufruct under the act of 1844, to the extent of the community property,* and this act as *delivered under it* is to take place and effect on the day of my death." Page 61.

At the time this act of sale and donation was made it does not appear that Oliver J. Morgan was indebted to any one except his child and great-grandchild.

The bills of exchange held by Gay are dated in 1860 and 1861. Exhibit, page 1.

Therefore no fraud on creditors was anticipated; for Oliver J. Morgan was wealthy, and no fraud on creditors could have been intended, because there were no creditors to defraud.

Oliver J. Morgan died in October, 1860; his daughter, Julia, had died before him. Mrs. Narcisse K. Johnson, wife of Mat. F. Johnson, says her mother, Julia Morgan, died 1st May, 1860. Pages 91 and 89. Mat. F. Johnson also says Julia Morgan died 1st May, 1860, and that Oliver J. Morgan died in October, 1860. Page 92. To the twenty-fourth interrogatory he says Mrs. Morgan died before her father. Page 95. Mrs. Narcisse K. Johnson also says that the first husband of her mother, A. C. Keene, died in 1855, and that at the time of her mother's death in May, 1860, she was 13 years old, and her sister, Julia H. Morgan, wife of George G. Johnson, was only 2 years old. Page 91. She was married to Mat. F. Johnson on 27th December, 1860. She was only 13 years old at the time of her mother's death in May, 1860. Her sister, Julia H. Morgan, was married in July, 1878. Page 91.

All the proceedings in Oliver J. Morgan's succession were taken during the minority of Julia H. Morgan, who was only 11 years old when the plantations hereinbefore enumerated were sold as the property of Oliver J. Morgan to pay his debts. Mrs. Narcisse K. Johnson was also a minor until May, 1868. The petition for sale was filed in the probate court on 9th December, 1868, and the sales took place on 19th July, 1869. Exhibit, pages 142 and 147.

The pretended sale of the three-fourths interest of Julia Morgan in the plantations conveyed to her by the aforesaid act of sale and donation, dated 9th March, 1858, was absolutely null and void, because the petition filed on 13th January, 1869, on its face sought to have the sale made in order to pay, not the *debt of the deceased*, but the debt of Oliver J. Morgan, for which neither Julia Morgan nor her estate was liable; and the

sale was made on 19th January, 1869, only six days after the petition was filed, whereas the law expressly requires a notice of thirty days. Pages 145 and 147. The law applicable to these facts will be brought to the attention of the court.

There is no evidence to show that Narcisse K. Johnson, who had just attained her majority, in any manner participated in the fraud which induced the court to set aside the probate sales made in 1869 at the instance of the creditors and of the executor of Oliver J. Morgan.

There is no evidence tending to show that Narcisse K. Johnson ever authorized Oliver T. Morgan, who was not her father (she being the issue of a previous marriage of her mother with A. C. Keene), to file a petition, as the executor of her mother, for the purpose of selling three-fourths of the interest of her mother in the plantations conveyed to her by the act of sale and donation dated 9th March, 1858. The truth is, Julia Morgan was the owner, as we contend, of the entire interest in all the lands conveyed to her by said act of 1858. The title to those lands, as we contend, was vested in her at the time of her death, subject to the usufruct of her father, and that title is now vested in her heirs, Mrs. Narcisse K. Johnson, surviving child of the first marriage with Keene, and Julia H. Johnson, only child of her second marriage with her cousin, Oliver T. Morgan, unless the conduct of Oliver T. Morgan, as executor of the mother of these heirs, has deprived them of their estate. The extent to which his conduct as executor can affect the title of the heirs will be considered.

Narcisse K. Johnson and Julia H. Johnson were asked on cross-examination the following question: "Did you, or either of you, ever authorize Oliver T. Morgan, as executor of your grandfather, or as executor of Julia Morgan, to make application to the probate court of Carroll parish to sell the plantations known as Albion, Wilton, Morgana and Westland, to pay the

debts of your said grandfather, and especially an alleged debt due to the heirs of Oliver H. Kelham, and pretended to be secured by mortgage on said plantations?" Page 87.

Narcisse K. Johnson in answer says: "I certainly never gave Oliver T. Morgan, as executor of my grandfather, any such authority, nor as executor of my mother, Julia Morgan." Page 92. Julia H. Johnson says: "I never gave any such authority." The truth is, she never could have done so, as at the time the petition was filed in 1869 she was only 11 years of age. Similar responses were made to the question, whether any authority was given to Oliver T. Morgan to have the said plantations inventoried as the property of their grandfather.

To the question: "When did you first become acquainted with the fact that said plantations had been inventoried in the succession of your said grandfather, and sold under order of the probate court of the parish of Carroll, to pay his debts?" (p. 87), Narcisse K. Johnson answers: "I never did know it certainly; I supposed there was a friendly division to be made." Page 62. Julia H. Johnson says: "I did not know it until informed of the fact by these interrogatories." Page 99.

In the case of Johnson vs. Waters, 111 U. S., page 647, the court uses this language in regard to the act of sale and donation dated 9th June, 1858:

"It may be urged that there was a consideration for the act and that this prevented it from being void. But that consideration, as shown by the account contained in the act itself, was only $67,495.70 due to Julia (which the act was to satisfy), and $9530.72 to be paid by her to Oliver H. Kelham; amounting in all to $77,726.42; whilst (by the same account) the value of the land conveyed by the act was $304,254.22. So that the consideration or charge in pecuniary estimation was only one-fourth of the value of the whole property conveyed. * * * Now the Civil Code, article 1510, divides donations *inter vivos* into three kinds—the purely gratuitous; the onerous which is burthened with charges;

and the remunerative, the object of which is to recompense services rendered. By article 1513 it is declared that the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services.

"In the present case the value of the object given exceeded not merely by one-half, but by nearly three times that of the charge or consideration. The act is subject therefore to the incidents and conditions of a donation, and it is void by the express letter of the code *unless it can be sustained in part by virtue of its being a sale in part and a donation for the residue.*

"Pothier writing under the old law says that where the charges of an onerous donation are of less value than the thing given, for example, 2000 livres, where the thing given has the value of 3000 livres, the act will be of a mixed nature, a sale for two-thirds and a donation for one-third. Contrat de Vente, Nos. 612, 614. Zachariæ, professing to give the modern French law under the code, states it substantially as the former law is stated by Pothier, and this would probably be the construction of the Civil Code of Louisiana. By this rule the act in question would have been a *sale for one-quarter of the land contained in it*, and a donation for three-quarters; or to speak with accuracy the proportion would be as $77,026.42 to $227,227.80, the whole amount conveyed by the act being $304,254.22 If the old rule applies under the specific provisions of the code the act was a good conveyance for the above proportion, and void as to the residue. *As this matter of valdity in part was not discussed before us it may come up* for consideration by the Circuit Court, if called upon to instruct the master as to the *ulterior disposition of the proceeds of any sale* that may be made of the lands in controversy. *As the representatives* of Julia Morgan allowed the land to be sold in 1869 *they cannot claim any portion of them now specifically as lands;* but they may be entitled in equity to such proportion of the proceeds as the act of sale and donation was a sale and not a donation. The above value of the lands was shown by the account to be $437,961 80. Of this amount the sum of $77,026.72, the only real consideration of the act, is about 17 6-10 per cent. Should all the lands be sold the heirs of Julia Morgan may be entitled to this proportion of the proceeds, free and clear of all debt. *We do not now decide this question.* For the present purpose it is enough to say that it is very clear that the act of donation does not convey to Julia Morgan three-fourths of the land as claimed, and did not in fact convey to her one-fifth of the land, if it conveyed any portion thereof." Page 648–9.

The decree of the court declares the sales made in January, 1869, by order of the probate court of the parish of Carroll null and void as against the creditors of Oliver J. Morgan, and sets

them aside; it directs the sale of the lands, if necessary to pay the debts of Oliver J. Morgan, and provides that the master may apply to the court for further directions, "especially as to the question whether the succession of Julia Morgan, deceased, is entitled to any and what portion of the proceeds arising from the sale of said lands, by virtue of the act of sale and donation made to her by Oliver J. Morgan in 1858, so far as said act was a sale and not a donation."

III.

This decree was rendered in a cause in which neither the succession of Julia Morgan nor any of her heirs were parties.

The complainants in the present suit are the heirs of Julia Morgan, and in their bill, after setting forth their heirship; the debt due to Julia Morgan by her father; the act of sale and donation of 1858; and the probate sales made in 1869, and the suit of Gay to set them aside, and the decree of this court declaring said sales null and void, they aver that they were not parties to said suit, nor were their interests represented therein, and that they are not affected by said decree. They then claim that the act of sale and donation is valid, but if it be void, it did not constitute payment of the price which Oliver J. Morgan had agreed to pay at the partition sale in 1858, and therefore Oliver J. Morgan never became owner of Julia Morgan's share of the community property.

They also aver that the decree of this court reinstates the creditors of Oliver J. Morgan in the position occupied by them prior to the probate sale of the property, and that if the act of sale and donation be valid they, as heirs of Julia Morgan, are entitled to all the property included in said act; but if it be invalid they are creditors of the succession of Oliver Morgan to the extent of $67,495, with interest from 1860, or they are to be considered owners of one-half of Narcisse Deeson's succession. They

also aver that the master is now engaged in receiving proofs of claims against the succession of Oliver J. Morgan, and that they had made presentation of their claim for $67,495.60, with interest from 1860, or their share of the price of the community property purchased by Oliver J. Morgan, but said claim was presented with reservation of rights to be set forth in their bill, and to be insisted on or not, as counsel may determine.

They further aver that such are the complications in which their rights are involved in consequence of the action of Oliver J. Morgan in his lifetime, of his representatives since his decease, and of the creditors themselves, and such is the difficulty of the legal questions involved, it is impossible without the aid of a court of equity to unravel the knot and adjust the rights of all parties; and on the foregoing statement of facts they ask for such relief as the nature of the case and the court in its judgment shall think just and equitable. The prayer of their bill is that the rights of the complainants may be protected in case the property should be sold under the decree of the Supreme Court, or that they be adjudged owners of all the property designated in the act of sale and donation, or of such part thereof as may be equitable, or that they be adjudged owners of one-fourth of the community property sold to Oliver J. Morgan in 1858 and never paid for by him, or that they be entitled to an equitable interest in the proceeds of said property, or that they be entitled as creditors as aforesaid, or to such other relief as the justice of the case demands. Pages 17–20.

Before this suit was instituted permission was given to the complainants by order of the circuit court to file their bills in the alternative, and to claim as creditors of Oliver J. Morgan, or as owners of the property, and also to file their claims as creditors before the master, or such bills as they wished, or both together, without prejudice to either or any right they might have. (See petition for permission and order thereon, pages 36-7).

The circuit judge, in deciding this cause, considered himself concluded by the decree of this court rendered in the case of Johnson vs. Waters, as to the ownership of the lands specified in the act of sale and donation; but declared that the heirs of the deceased wife of Oliver J. Morgan were creditors of his succession for the price of the community property purchased by Oliver J. Morgan at the partition sale, in the sum of $134,991.40, which became due and payable at the death of Oliver J. Morgan in 1860; and that the complainants, except Buckner for himself, may present their claims, thus recognized and fixed, to the master, as ordinary claims or debts due by Oliver J. Morgan, to be paid out of the proceeds of the plantations, when sold under the decree of this court in Johnson vs. Waters, except in so far as they may have been paid out of the property of Oliver J. Morgan's succession, its rents and revenues. (Opinion, pages 110-111; decree, page 104).

The decree, however, dismissed the bill of complaint, but reserved the right of the complainants to go before the master appointed in the suit of Johnson vs. Waters, and prove up as ordinary claims the sums due them on account of said indebtedness of $134,991.70, provided the complainants' account for the property of the estate of Oliver J. Morgan, its rents and revenues, which came into their hands as heirs or as grantees.

Stephenson Waters, administrator of Gay, appealed from this decree, and so did the complainants, Narcisse Keene and Julia H. Morgan. Pages 106 and 107.

IV.

Assignments of error on the part of the complainants, Narcisse Keene and Julia H. Morgan:

A. The circuit court erred in dismissing the bill and refusing to adjudge Narcisse Keene and Julia H. Johnson to be owners

in whole or in part of the plantations and lands described in the bill, and conveyed to Julia Morgan by act of sale and donation dated 9th March, 1858.

B. The circuit court erred in dismissing the bill and in not adjudging that said act of sale and donation was valid in whole or in part, and that Narcisse Keene and Julia H. Johnson were, as heirs of their mother, Julia Morgan, entitled as owners, in whole or in part, to the lands specified in said act of sale and donation, and that said lands, in whole or in part, were not subject to sale as the property of the succession of Oliver J. Morgan, for the purpose of paying the debts of said Morgan.

V.

1. It is quite clear that the decree rendered by the court in Johnson vs. Waters is not *res adjudicata* against the complainants, Narcisse Keene and Julia H. Johnson, simply because they were not parties to the suit, nor were they in any manner represented therein. They claim title to the lands in question by purchase, not by descent from their grandfather. No suit against their grandfather's succession could affect them. Their mother, Julia Morgan, died before her father, Oliver J. Morgan, and the title to the lands in question is claimed by the complainants as heirs of their mother. They claim adversely to their grandfather and to his succession, and therefore when the demurrer was filed, raising the objection that the heirs and executor of Oliver J. Morgan should be made parties to the suit, the objection was obviated by the appearance of the executor, and by the consolidation of the Buckner suit with this suit, and the stipulation found at page 31 of the transcript.

2. The complainants claim title under the act of sale and donation made to Julia Morgan on 9th March, 1858.

That act is and it professes on its face to be a sale as well as

a donation. To the extent to which it is a sale there is no legal objection to its validity. As a testamentary paper it is void for want of form; as a pure donation it is void because the donor reserves to himself during his life the usufruct of the lands donated; but as a sale it is valid at least in part.

The court in its opinion delivered in Johnson vs. Waters says:

"As this matter of validity in part was not discussed before us it may come up for consideration by the circuit court if called upon to instruct the master as to the ulterior disposition of the proceeds of any sales that may be made of the lands in controversy." Page 649.

It is to that matter I now call the attention of the court.

The opinion in Johnson vs. Waters treats this act of sale and donation as if it were merely an onerous donation, and subjects it as a pure donation to the dominion of article 1526 of the Civil Code of Louisiana, which provides, "that the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations except when the value of the object given exceeds by one-half that of the charges or of the services."

What is an onerous donation? It is defined in article 1523 of the Civil Code of Louisiana as a donation "which is burthened with charges imposed on the donee."

The characteristic of the onerous donation is that it is a donation burthened with *a charge imposed on the donee.* Now this act of sale and donation is not burthened with any charge whatever *imposed on the donee* except the charge to pay Oliver H. Kelham $9530.92 in order to make up his one-fourth interest in the estate of the grantor. The debt of $67,495.70 due by the grantor to Julia Morgan, which formed part of the consideration for the act of sale and donation, was *was no charge imposed on the donee;* it was a present consideration which passed between the grantor and the grantee; the debt was extinguished by the acceptance of the

grant—it was in fact so much cash paid by the grantee to the grantor.

This act of sale and donation was therefore, 1, a sale in part; 2, a donation in part with a charge, the charge being only $9530 72.

So far as it is a donation with a charge, if that were the sole consideration of the grant we might concede that the rules peculiar to donations should be applied to it. This view would make the act a mixed instrument—*a sale in part and a pure donation in part.* But such an act is by *no means void.* The title passes from the grantor to the grantee; it is valid and subsists until attacked by direct action instituted for that purpose by the heirs of the grantor or by injured creditors; until the bad is separated from the good. No such action has been instituted. The suit of Gay was that of a creditor of Oliver J. Morgan against his succession, and against the possessors of property at a succession sale, to set aside the sale for a fraud perpetrated by means of the sale on the creditors of the succession. The title of Julia Morgan under this act of sale and donation has not been assailed by any one, in a direct action for that purpose instituted against her or her heirs. The court in a collateral way, with the view to establish the fraudulent character of the probate sale, treated this act of sale and donation as an onerous donation simply, and therefore absolutely void, because: 1. The charges were only one-fourth of the value of the property conveyed, and therefore under article 1523 it was to be governed by the rules peculiar to donations. 2. Because, being a pure donation it was void because the donor reserved to himself during his life the use of the lands donated.

The error, I submit, consists in treating the debt of $67,495.70 due by Oliver J. Morgan to his daughter Julia as *a charge* imposed on the donee and not a consideration or price paid by the grantee to the grantor. It is evidently no charge on the donee, because the grant and the payment are *simultaneous.* This question never was considered or discussed; the briefs which I

have examined are silent on the subject, and the court will not consider itself bound, even on a second appeal in the same case, by expressions of opinion on matters, the disposition of which was not required for the decision of the case.

Barney vs. Winona R. R. Co., 117 U. S. 231.

A fortiori the court will not be bound by such expressions in a different case between different parties.

The fact is, the act of sale and donation was a conveyance of the lands described in it at a fixed value, for which Julia Morgan paid $67,495.70, or the debt due to her by the vendor, and agreed to pay the further sum of $9,550.72, the grantor having released her from any further payment by the gift to her of the difference between the amount of the two sums of money mentioned and the total fixed value of the lands. Mourlon tells us that such liberalties, accessory to or mixed in the contract, when made between persons capable of contracting, participate *of the liberty of the onerous contract which sustains them.*

2 Mourlon, page 345, No. 681.—The author in this section discusses the question whether a donation disguised under the form of an onerous contract is valid, when the contract is not executed with the formalities prescribed for a donation. He says that if the contract, which on its face appears to be a sale, is in fact purely gratuitous, it is void unless executed in the form prescribed by law for a donation ; but if it be a *mixed contract* it is valid.

There is a difference of opinion among French authors whether or not a pure donation, disguised under the form of an onerous contract, is affected by the form in which the contract is executed ; but there is no controversy concerning the validity of a mixed contract, partly onerous and partly gratuitous.

Demolombe says that a donation by the vendor to the vendee in the act of sale of part of the price is valid, even though the contract be not executed in the form prescribed for a donation.

20 Demolombe, No. 98.

It is true that if the donation be of such proportion of the price, as to reduce the consideration actually paid to the vendor below half value of the thing sold, the vendor may sue to rescind the sale on account of lesion.

Pothier says, a clause inserted in the contract of sale, declaring that the seller makes a donation to the buyer of what the estate might be worth, more than the price, is not less a means of evading the law (on the subject of lesion), than the clause by which he renounces the benefit of it in favor of the buyer.

Contract of Sale, No. 356.

The Louisiana code adopts the views of Pothier, and has expressed them in the following articles:

"Article 1589. If the vendor has been aggrieved for more than one-half the value of an immovable estate by him sold, he has the right to demand the rescission of the sale, even in case he had expressly abandoned the right of claiming such rescission *and declared that he gave to the purchaser the surplus of the thing's value.*"

"Article 2591. If it should appear that the immovable estate had been sold for less than one-half of its just value the purchaser may either return the thing and take back the price which he has paid, or make up the just price and keep the thing."

"Article 2595. Action for rescission of sales on account of lesion beyond moiety must be commenced within four years. These four years with respect to minors begin only from the day they become of age; with respect to persons of full age they begin from the day of the sale."

"Article 2598. The buyer is entitled to repayment for ameliorations which he has effected, although they be merely for pleasure and convenience."

"Article 2599. He may remain in possession of the thing sold until the seller has returned the price he paid, together with the expenses."

Not only the heir but the creditor also of the vendor can

exercise his right to rescind a sale on account of lesion of one-half.

2 Troplong, vente No. 799.

Article 1990 of the civil code provides that "in case a debtor refuses or neglects to accept an inheritance to the prejudice of his creditors they may accept the same, and exercise all his rights in the manner provided for in the title of succession; and they are authorized by virtue of the action given by this section to exercise all the rights existing in favor of the debtor for recovering possession of the property to which he is entitled, in order to make the same available to the payment of their debts."

But no creditor can sue to annul a contract made before the time his debt accrued. C. C. 1993.

There may be a question whether this sale to Julia Morgan could have been rescinded by the heirs of the seller on account of lesion, because it purports, on its face, to make a gift to a child for the purposes of a family arrangement, and therefore the circumstances might be sufficient to rebut the legal presumption that the gift clause was inserted in the act under the pressure of necessity. But creditors existing at the time of the sale could attack it to the extent to which it was gratuitous, and forced heirs of the grantor could sue for the reduction of the gratuitous part to the extent to which it affected their legitime—that is to say, the portion reserved to them by law.

But until direct action to attack the transfer is brought by creditors or by forced heirs against Julia Morgan or her heirs, and a decree is rendered annulling the transfer to the extent to which the rights of the complainants are impaired, the conveyance stands as an operative instrument, which, in 1858, vested in Julia Morgan the legal title to the property which has been transmitted by descent to her heirs.

If such a direct suit were brought complainants would fail, unless they tendered the amount of the debt due to Julia Morgan by her father, which was the consideration paid by her for the pro-

perty. At all events she or her heirs could retain possession of the property until the debt is paid.

C. C. 2599.

As the case now stands, the court has declared the act of sale and donation an absolute nullity, allowing Julia Morgan's heirs to claim only a small proportion of the proceeds of the sale of the property, which has depreciated so much in value, that it is not more than sufficient to pay the $67,495.70 due to her by her father.

Pothier, in speaking of the rescissory action for lesion, says: "The object of this action being to rescind the contract of sale it follows that while the seller by means of it causes the contract to be declared null, the buyer has the right to reclaim the price paid in the same manner that the seller has to reclaim the estate; for the contract of sale being rescinded, there is no longer any cause to give the one a right to retain the price and the other the estate. Besides, it is of the nature of all rescissory actions that the parties should be placed in the same situation in which they were before the act was rescinded."

Pothier, Contract of Sale, No. 333.

Such is the jurisprudence of Louisiana.

Landry vs. Landry, 40 La. An. 232.

Pugh vs. Canty, 33 La. An. 792.

As I have said the error of the court consists in treating the debt of $67,495.70 as a *charge*, and in classing the act of sale as *an onerous donation.*

The following articles of the Louisiana code cover the case on this point:

"Art. 1523. There are three kinds of donations *inter vivos:* the donation purely gratuitous, or that which is made without condition and merely from liberality; the *onerous donation*, or that which is burthened *with charges imposed on the donee;* the *remunerative* donation, or that the object of which is to *recompense for services rendered.*"

"Art. 1524. The *onerous* donation is not a real donation if the value of the object given does not manifestly exceed that of the *charge imposed on the donee.*"

"Art. 1525. The *remunerative* donation is not a real donation if *the value of the services to be recompensed* thereby, being appreciated in money, should be little inferior to that of the gift."

"Art. 1526. In *consequence*, the rules peculiar to donations *inter vivos* do not apply to *onerous* and remunerative donations, except where the value of the object given *exceeds by one-half* that of *the charge or of the services.*"

"Art. 1527. The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals."

None of these articles are to be found in the Code Napoleon nor in the Louisiana code of 1808. They were introduced as new articles by the compilers of the code of 1825.

See projét of La. Code, p. 203.

They were incorporated into the code for the purpose of defining the three kinds of donations and of settling what the French code and the code of 1808 have left open, namely: what amount of charge or service valued in money was necessary to denude the donation of its gratuitous character and place it in the class of onerous contracts.

The onerous donation referred to in article 1526 is the onerous donation defined in article 1523 and referred to in article 1524.

The definition says that an onerous donation is "that which is burthened with *charges imposed on the donee.*" Article 1524 says such a donation is not a real donation "if the value of the object given does not manifestly exceed that of the *charges imposed on the donee.*"

Article 1526 says: "*In consequence*"—that is to say, in consequence of the preceding rules and definitions—the rules peculiar to donations *inter vivos* do not apply to *onerous* donations except when the object given *exceeds by one-half that of the charges.*

A charge is a mode or condition limiting or restraining the donation. A mode is a clause or stipulation having for its

object a restraint or modification of the rights conferred on the donee. 7 Aubry and Rau, page 378.

Or, as Troplong defines it in his treatise on donations, vol. 1, No. 352, a mode is a stipulation added to the donation, which obliges the donee to do or to give something after he shall have received the gift. It differs from a suspensive condition, in as much as such condition suspends the legal effect of the donation until the condition is accomplished.

Merlin tells us that a mode is sometimes confounded with a condition, and that some texts of the Roman law give to the one the name of the other; but there is a difference between a mode and a condition, and it consists as much in the manner of expressing them as in the effects produced: "La loi 80 D. de conditionibus et demonstrationibus nous apprend en quoi la formule caractéristique de la condition diffère de celle qui désigne le mode. Nec enim dit elle parem dicimus eum cui ita datumest. *Si* monumentum fecerit, c'est la condition; et eum cui datum est *ut* monumentum faciat, c'est le mode. On voit par lá que la particule *si* forme la condition, et que les mots, *pour, afin, que, a la charge* caractérisent le mode."

Merlin Rep., verbo Mode, vol. 20, page 350.

A charge is therefore either a mode or condition imposed by the donor on the donee at the time the gift is made, the non-performance of which will give rise to an action for a revocation of the donation. It is therefore clear that a sum of money paid by the donee to the donor, or a debt due by the donor to the donee, extinguished by the terms of the donation, is not *a charge imposed on the donee.*

---

3. Have the rights of Julia Morgan's heirs to insist on their claim to the property specified in the act of sale and donation been impaired by the conduct of Oliver J. Morgan, executor of Julia Morgan's will?

It seems that John A. Buckner and other creditors of the succession of Oliver J. Morgan applied to the probate court for an order to sell the immovable property of the deceased situated in the parish of Carroll for the purpose of paying debts. Oliver T. Morgan, as the executor of Oliver J. Morgan, intervened in this proceeding and joined the creditors in their application for a sale. See petition, p. 344. The petition did not describe the lands to be sold, although it asked for an inventory and appraisement of them. It appears to have been filed in the probate court on 14th December, 1868, but on the eighth of the month, a week before it was filed, the judge made an order in which the prayer of the petition was granted, and directing an inventory to be taken and the issue of a commission to the executor to sell the lands. More than a month after this order was made—to-wit, on the 13th January, 1869—Oliver T. Morgan, as executor of Julia Morgan, filed a petition in her succession, as follows:

"That on the day of , 1868, your petitioner, in his capacity as executor of the last will and testament of Oliver J. Morgan, deceased, presented to your honorable court a petition praying for a sale of the real property of said estate; that for the purpose of paying the debts of said Oliver J. Morgan, deceased, an order was granted on said petition by your said court whereby the following property was ordered to be sold at public sale, to-wit:

[Here follows a description of the property.]

"Your petitioner shows that said Julia Morgan claims to be owner of *three-fourths undivided interest* in said lands, although they are claimed in toto by the estate of said Oliver J. Morgan, and are *offered for sale in order to pay his debts;* that the debts due by him to the heirs of Oliver H. Kelham, who are also heirs of Mrs. Narcisse Morgan, deceased, late wife of said Oliver J. Morgan, amount to *$137,000*, being for one-fourth of the interest of said Mrs. Narcisse in the community existing between her and her said husband which devolved to said heirs and which said community had been adjudicated to said Oliver J. Morgan at said sum; that said sum of money so due by said Oliver J. Morgan is secured by a legal mortgage on all of said land; that in order that said property may be sold to *the benefit of* said estate it is necessary that the interest of said Mrs. Julia Morgan may be sold at the same time; that her *said interest is under the encumbrance* of

said mortgage existing against said Oliver J. Morgan for the amount so due to the heirs of Oliver H. Kelham, and that for the purpose of paying the said sum to said heirs of Kelham the interest of Julia Morgan, deceased, should also be sold. Wherefore petitioner prays that an order for the sale of the interest of said Julia Morgan, deceased, in said lands, may be made for the purpose of paying said debt," etc.

On 13th January, 1869, the following order was made by the judge:

"The foregoing petition being considered, it is ordered that the prayer of petitioner be granted; that the undivided interest of said Mrs. Julia Morgan, deceased, in said lands be sold at public sale *in order to pay said debt*," etc. Exhibit, pages 343-6.

The property was sold on the 19th January, 1869, *six days* after the order made in the succession of Julia Morgan. See return of executor, page 348.

I call the attention of the court to the following facts:

1. The petition of Oliver T. Morgan, as executor of Julia Morgan, filed in her succession, represents that a sale is necessary, not *to pay the debts of Julia Morgan, deceased*, but the debts of Oliver J. Morgan.

2. It sets forth the origin of the debt for which the property is to be sold—the debt of Oliver J. Morgan, arising out of his purchase of the community property. It represents that debt to be due to the heirs of Kelham, and that it amounted to $137,000, when in fact it was only *$67,495.60*; it represents that said debt was secured by *legal* mortgage on all the property, which was not true; it represents that Julia Morgan claimed *three-fourths interest*, when in fact she claimed all.

3. The property never was advertised to be sold under the order granted in the succession of Julia Morgan, because the executor's return in the succession of Oliver J. Morgan shows that the advertisement was made under the order granted in the succession of Oliver J. Morgan on 18th December, 1868, and the property was sold on 19th January, 1869, only six days after the

order granted in the succession of Julia Morgan. As to her heirs or her succession the sale was an absolute nullity, for her interest could only be divested under the order in her succession by a sale made after thirty days' notice.

But the probate court had no power to order a sale of succession property to pay the debts of any one save those of deceased, even if the debts were secured by mortgage on real estate belonging to the deceased. The representation that such a mortgage existed was not true in fact, and the court has decided in Johnson vs. Waters that it was made for a fraudulent purpose.

Is it possible that an executor can by such a proceeding alienate the property of the heirs of Julia Morgan, one of whom at the time was a minor of tender years, and the other a married woman who had just attained her majority? Julia Morgan died in 1860, before her father; she owed no debts at the time of her death, and her succession owed no debts in 1869. when the order was obtained.

An executor in Louisiana does not represent the heirs. He is a mere mandatory of the deceased to see to the execution of his will. By law the title to all the property of the deceased is vested in the heirs at the moment of the decease, and they have the legal seisin of the estate.

In the succession of Dupuy, 4 La. An., p. 671, the court says: "The functions of a testamentary executor are a mandate, differing from other mandates in this only, that it begins at the death of the principal, when all other mandates end. That mandate under our laws, when it is not enlarged by the will, is limited to the execution of the legacies contained in the will and to the payment of the debts; and the powers which it gives are to be strictly construed."

Article 123 of the Code of Practice of Louisiana provides that: "Testamentary executors may appear and defend all the actions brought against the succession they administer when none of the heirs are present or represented in the state; but if all the heirs, or any one of them, be present or represented, none but personal actions can be brought against the testamentary executor alone. All real actions, such as those of revendication and

the like, must be brought both against the testamentary executor and the heirs present or represented."

The decisions are that an executor cannot represent the heirs in a real action; such suits must be brought by or against the heirs and the executor.

Bird vs. Generes, 30 La. An. 576.

Giddens v. Mosely, 37 La. An. 417.

It is true an executor is authorized to apply to the probate court for an order to sell real or personal estate for the purpose of paying the debts of the deceased. Julia Morgan owed no debts, and the petition for sale filed by her executor avowedly provokes the court to order the sale of the property to pay a specific debt due by Oliver J. Morgan to the Kelham heirs; a debt for which Julia Morgan was not liable, nor did it operate as a lien on her property

I am aware that it is the settled jurisprudence not only in Louisiana but elsewhere, that a purchaser at a sale made under an order of the probate court is not bound to look beyond the decree recognizing its necessity. But that doctrine is intended for the protection of *bona fide* purchasers who have paid their money on the faith of such decree. It has no application to this case. Here the sale of the property has been annulled because of the fraud of the executor who provoked it, and of the purchasers who conspired with the executor in the perpetration of the fraud. There is no *bona fide* purchaser who claims the protection of the court. Besides, so far as the sale is to be regarded as a probate sale of the property of Julia Morgan it is void, because it was not advertised for a longer period than six days after the decree was rendered. Immovable property can be alienated in Louisiana by judicial process only after previous advertisement of thirty days.

Article 1670 of the Civil Code provides that sales by executors for the payment of debts must be made in the manner prescribed for curators of vacant successions.

Article 1167 provides that in all cases in which is ordered the sale of property belonging to vacant successions "the sale shall be made at public auction to the highest bidder after the advertisements and publications required by law—to-wit, ten days for movables and thirty days for immovables."

Gernon vs. Bostick, 15 La. An. 697.

As I have already said, the order of sale made in the succession of Julia Morgan is on its face *an order to sell the undivided three-fourths interest* in the property described in the petition to pay "*said debt*"—that is the debt due by Oliver J. Morgan to the heirs of Kelham, not to pay the debts due by Julia Morgan. The order is to be determined in its scope and effect in conjunction with the petition to obtain the sale and the prayer therefor.

Succession of Bright, 38 La. An. 142.

There was no advertisement "of the undivided three-fourths interest of Julia Morgan." There was no accounting to her succession for any portion of the proceeds of the sale; they were accounted for and distributed to the creditors of Oliver J. Morgan in his succession. Exhibit, pages 53, 55 and 351. Such proceedings were absolutely void on their face.

Succession of Bright, 38 La. An. 141.

No probate court has the power, on the application of an executor or administrator, to order the property of the deceased to be sold to pay the debt of a third person, or any debt other than that of the deceased. The executor or administrator on such *ex parte* application must satisfy the court that there are debts of the deceased to be paid.

Even a purchaser at a succession sale will not be protected where the petition for sale, on its face, shows a want of power in the court to make the order for sale.

Succession of Dumestre, 40 La. An. 574.

The doctrine of estoppel cannot be invoked against these complainants—one a minor, the other a married woman—when

Oliver T. Morgan, as executor, filed the petition to sell the interest of Julia Morgan in these lands.

Any act of Oliver T. Morgan as executor will not estop this minor and her sister from claiming ownership in the lands. It is only the act of an *owner* which can be invoked by way of estoppel; a minor or a heir cannot be estopped by the act of the executor.

Egan vs. Bell, 13 La. An. 508.

Besides, the vital principle of estoppel is, that one who by language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

Dickerson vs. Cosgrove, 100 U. S. 578.

The purchasers at the judicial sale knew all the facts and were not misled.

Steel vs. St. Louis Co., 106 U. S. 447.

Gay did not act on the averments contained in the petition for sale, nor was he mislead by them, for he repudiated the whole transaction as a fraud.

Ketchum vs. Duncan, 96 U. S. 659.

Respectfully submitted.

THOS. J. SEMMES,

of Counsel for the Heirs of Julia Morgan.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 135.

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED, APPELLANT,

versus

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSE KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSE KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLANTS,

versus

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED.

Filed

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANT, BUCKNER, AND MINOR CHILD.

J. R. BECKWITH,
Counsel for Appellant.

A. W. Hyatt, Printer and Stationer, 73 Camp st., N. O.—47658

FILED
NOV 20 1889

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 135.

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED, APPELLANT,

versus

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSE KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSE KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLANTS.

versus

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED.

Filed

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANT, BUCKNER, AND MINOR CHILD.

J. R. BECKWITH,
Counsel for Appellant.

A. W. Hyatt, Printer and Stationer, 73 Camp st., N. O.—47658

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 135.

JOHN A. BUCKNER, FOR HIMSELF AND AS TUTOR OF ETHELINE BUCKNER, A MINOR; NARCISSE KEENE, MATTHEW F. JOHNSON, HER HUSBAND; JULIA H. MORGAN AND GEO. G JOHNSON, HER HUSBAND.

versus

STEPHEN WATERS, ADMINISTRATOR OF WM. GAY, DECEASED

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF OF APPELLANT, BUCKNER.

In this cause I only appear in the case of Buckner, individually and tutor of his minor child, against Waters, administrator, the first bill in order in the printed transcript. The balance of the appellants named in the title are complainants in another bill, to be found on page 17 of printed record—a bill setting up interests antagonistic to Buckner and the minor represented by him, praying relief, which, if granted, cuts off all relief from the heirs of Ann Morgan, or at least refers them to a bankrupt succession for relief for all inheritance coming to them from the com-

munity rights of their ancestors or source of inheritance, Narcisse Deeson, the deceased wife of Oliver J. Morgan; for, if the alleged act of donation set up by the complainants in the other bill is held good, there is nothing left in the succession for the complainants in this case as heirs of the estate of Narcisse Deeson, unencumbered at the date of her death.

The complainants are the heirs-at-law of Narcisse Deeson: the minor, Etheline Buckner, by direct descent in the descending line, and the complainant, John A. Buckner, as the heir-at-law of his deceased children, who, at the time of his death, were unmarried and without heirs in the descending line, their father being, of course, their nearest heir in the ascending line, one of them having survived his mother, who was in the direct descending line heir of Narcisse Deeson as to all of her community rights as wife of Oliver J. Morgan, as set out in the bill.

The bill is alleged to be a supplemental bill, or a bill in the nature of a cross bill, and was filed under an order of the court giving election. (Rec. 36-37).

The bill sets out the line of inheritance of complainant Buckner and his minor children from Ann Morgan; the nature of the estate of Narcisse Deeson as wife in community of Oliver J. Morgan; her death prior to the decease of her husband, Oliver J. Morgan; the attempt of her surviving husband to close out her community estate by partition and sale; the sale under the partition proceedings; the purchase of the property by Oliver J. Morgan; the attempted *giving in payment* by Morgan; his death; the probate of his last will, in which he treated the action of donation as a nullity, as it undoubtedly was neither a donation *inter vivos*, a sale nor giving in payment.

That during his lifetime Oliver J. Morgan treated the Melbourne plantation as the property of Kelham as settlement of his rights in the succession of Narcisse Deeson; that at the time this plantation was set apart to Kelham it was wild land, was reduced to cultivation and given value by those in possession at

their expense, Oliver H. Kelham, Oliver H. Kelham, Jr., and the complainant Buckner; and that all of the personal property on the plantation had always belonged to the possessor and not to Oliver J. Morgan; that during the war all of the property on the plantation and the plantation itself was devastated and ruined, the plantation overflowed, ditches filled up and rendered in all things unfit for cultivation; that after the war John A. Buckner on account of the heirs of Oliver H. Kelham reduced the plantation to a condition to put it in cultivation at a large expense; that the title to part of the plantation was in the United States, but Buckner at a great expense obtained patents and perfected the title.

Sets out the probate sale of the lands to pay debts due the succession of Oliver J. Morgan; that Buckner, as tutor of his minor child, united in the petition for sale because he thought from the fact that no proper title to the Melbourne plantation had been made by O. J. Morgan, the sum of $67,495.60, with interest from the death of O. J. Morgan, had not been paid, and was a preferred debt on the succession of O. J. Morgan; that he was recognized by the then existing executors as a creditor, and that at the instance of Gay filing a creditor's bill the sale was set aside.

That his recognition as a creditor with privilege was solemnly recognized by the probate court, and made a judgment of that court by a decree homologating the account of the executor rendered June 14th, 1870, which was and is the judgment and decree of a competent court of record, seized of the whole matter of inquiry in the succession, and holding all of the property and assets of the succession in judicial custody by proceedings *in rem*; that this decree is unreversed and in no manner avoided or even appealed from.

That complainant Buckner is willing to accept the Melbourne plantation and abandon all claim as a creditor of the estate of O.

J. Morgan upon a decree being made recognizing him and his daughter Etheline as owners of the plantation.

That in the event this is not granted, then in equity and justice Buckner and his daughter should be held entitled to one-fourth of the community property in equal share with the heirs of Julia Morgan.

That the bill is brought by reason of complications that have arisen in this litigation, and prays that the complainant and minor daughter, Etheline, may be decreed to be owner of the Melbourne plantation, or owner of one-fourth of the property as it existed at the death of Narcisse Deeson, or to an equitable interest in the proceeds of any sale that may be made of the property of the succession.

The cases were consolidated and heard on bill, answer, replication and proofs, and the decree found on page 105, rendered. The decree is one dismissing both bills, and ought to have been the end of the decree in an ordinary case, but the dismissal here is with some affirmative matter, best considered by an inspection of the decree as printed. Buckner was decreed to be cut off from all claim on the succession for the share which fell to him by inheritance, and all of the debt of Morgan representing the estate of Narcisse Deeson is declared to be but a common unsecured debt, and Buckner to have no standing, or even a creditor. From this decree all parties appealed.

Assignment of error on the part of John A. Buckner for himself and the minor, Etheline Buckner.

I.

The court erred in dismissing the bill of complaint, and in not granting the relief prayed for.

II

The court erred in proceeding after dismissal of the bill to decree against the demands of the complainant.

III

The court erred in decreeing in effect that the complainant Buckner was cut off from all right in the succession of Oliver J. Morgan, and without right to even prove a debt against the succession.

IV

The court erred in limiting the right of the minor, Etheline Buckner, to a right to stand in no other relation to the sucessession of Oliver J. Morgan than that of simple unsecured creditor.

The interests of the complainant in this bill are antagonistic to the claim set up by the complainants in the bill with which it is consolidated. That is the claim set up by the heirs of Julia Morgan, that the alleged act of donation and sale is valid, and conveyed to them or to Julia Morgan all of the plantations except the Melbourne, as that would throw all of the debts of the succession on the Melbourne plantation, cut the heirs of Ann Morgan out of all possible chance of any inheritance.

It would seem from the bill and answers in the original case of Waters vs. Buckner, together with the decree in that case, that the question of the effect of the act of donation and sale as translative of property was settled by this court beyond controversy, and that it has no effect as a donation. The reasoning upon which it is declared that the instrument is void as a donation, as given in the opinion in that case, cannot be impeached. The truth is that although called a "donation" it has no indication on its face that it was intended for anything but making haste to favor Julia Morgan and her heirs by a disposition of property in contemplation of death, to take effect as a will would take effect at Morgan's death, and to use the community property of his deceased wife to swell the share or future inheritance of the heirs of Julia Morgan at the expense of the estate of the heirs of Kelham or Ann Mor-

gan; and the document has none of the formalities required of last wills or the disposition of property *causa mortis.*

With so much of the brief of the counsel of the heirs of Julia Morgan as set up the validity of the act of donation and sale, so-called, we rest on the fact that all of that has been litigated and determined, and if not *res judicata* the true doctrine and law relating to that document has been declared and settled by this court in the original case.

The court in that case made a suggestion that there was a question whether the act could not be held partially effective as a sale, in so far as it related to the alleged amount due to Julia Morgan from the sale of the community property of Narcisse Deeson. This question is doubtless open, but not difficult. To constitute a sale under the law of Louisiana there are several definite statutory requirements and incidents that are indispensable elements of all contracts of sale. It is necessary that there should be a meeting of minds both as to the precise object to be sold and the price or consideration for the sale.

La. C. C., art. 2446.
Kleinpeter vs. Harrigan, 21 A. 196.
Seibernagel vs. Baker, Administrator, 23 A. 700.
Warner vs. Burke, 24 A. 85.
Lee vs. Cummings, 27 A. 534.
Prude vs. Morris, 38 A. 767.

In respect of this act of "donation and sale," if we attempt to eliminate the donation, part of the scheme by which Morgan sought to invest Julia Morgan with the entire estate devisable away from the other forced heir, Kelham, there is no object, still less a price.

The deed attempts to transfer at least three large plantations, estimated to be three-fourths of Morgan's real estate. Morgan certainly never intended to sell all of the property named in the the deed for $67,495.60, charged with a payment of less than $10,000 to the heirs of Ann Morgan. If that was not his inten-

tion which of the plantations is to be taken? Is the one to be selected for the price of the debt due, and the charge to the heirs of Ann Morgan by the supposed purchaser? Oliver J. Morgan, never made any such bargain; he never elected what property should be taken in payment; the instrument does not furnish any means for the solution of the problem. There has been no election by the heirs of Julia Morgan, even if they could elect, either before or after the death of O. J. Morgan, the alleged donor or vendor. There is a total want of any definite object, as measured quantity of land to be transferred for the price of $67,495.90.

There is another obstacle in the way of holding any part of this transaction a sale. As the result of the partition proceedings and the retention of the price in his hands Oliver J. Morgan became the debtor of Julia Morgan for the price bid for her share of the community property secured by lien on the property sold. This indebtedness was *in money*, and could not be discharged by other than the payment in money without the consent of all parties or an observance of all of the requirements of law in that particular. Where a thing other than money is given in exchange for the obligation of a debtor, it is termed in the Louisiana statutes *giving in payment*, and is defined in article 2655, C. C.:

"*The giving in payment is an act by which a debtor gives a thing to the creditor who is willing to receive it in payment of a sum which is due.*"

"*Art. 2356. That giving in payment differs from the ordinary contract of sale in this, that the latter is perfect by the mere consent of parties even before the delivery; while the giving in payment is made only by delivery.*"

Queyrouze vs. Thibodeaux, 30 A. 1114.

Schultz vs. Morgan, 27 A. 616.

White vs. Bird, 20 A. 282.

In *dation en paiement* everything doubtful or ambiguous must be interpreted against the donee.

Grover vs. Steel, 3 A. 280.

It is further provided that in case of giving in payment the risk of the thing given is never in the donor unless he delays delivery beyond any reasonable time. A debtor who is insolvent can give nothing but money in payment.

With these exceptions giving in payment is subject to the same rules as govern ordinary sales, one of which is that the object given must be definite and certain as to quality and condition.

In the case of the deed in controversy there was no pretence of delivery; in fact the donor was to hold possession until death cut off the power to do the act necessary to consummate the giving in payment.

The bill not only prays for the alternative relief specifically named, but for such other relief as to the court shall seem meet and just. From the entire proof in both cases it is clear that to cut off Buckner from any recourse on the succession would be unjust beyond measure, and an act that equity will never sanction. It is beyond all question that the Kelhams in their lifetime, Oliver J. Morgan in his lifetime, all considered and treated the Melbourne plantation as the property of the Kelhams; that it was upon the faith of this belief, also possessed by Buckner, that large expense in the way of bettering the plantation and fitting it for cultivation was incurred by the possessors—expenditures that would have never been incurred but upon the belief of ownership.

The Melbourne was changed from a forest into a cultivated plantation; the wreck of the war and floods was repaired. Buckner with his own means met these extraordinary expenditures to a large extent.

In April, 1868, Buckner, as co-tutor of Oliver H. Kelham, Jr., the son of Mrs. M. M. Kelham, both having departed this life before that date, applied to the probate court for an adjustment of his accounts as tutor, tutorship having closed by the death of the minor. The record of this proceeding is printed on page 72 et seq. The result of this proceeding was a decree in favor of Buckner for the sum of $42,450.96, with legal mortgage

and privilege on all of the interest in the succession of Oliver J. Morgan making any part of the estate of the Kelhams as coming to them from the estate through Ann Morgan. This decree has never been reversed or appealed from, and is final and conclusive. The court, in the opinion in 111 U. S., supposed the judgment referred to in Buckner's petition for sale of real estate to be the judgment in the partition suit of Oliver J. Morgan. It was to *this judgment* that Buckner's petition referred. How can equity explain or justify the absolute cutting off of all of Buckner's rights in this judgment, as is done by the decree in this cause, he being barred by the terms of that decree from presenting for allowance *any individual claim of his own*?

The amount expended by Buckner in the improvement of Melbourne plantation, as shown in his sworn statement of account with and without interest, printed on page 76 et seq., exhibits the reason why the Melbourne plantation is valuable as an asset, while the other plantations are little better than wild land; the first statement showing (without allowance of interest) $81,239.93 excess of expenditures over receipts, with $51,820.36 expended in building and taxes. The other, with interest computed, shows $128,639.64 excess over receipts. These statements are not controverted by any proof. How can equity bar Buckner from any individual claim against the succession and be just, or attempt to adjudge the very right?

The hardship surrounding the position into which it is sought to force Buckner and the other heirs of Ann Morgan is unprecedented and startling. One of the most potent grounds urged and used to annul the probate sale was the assertion that Buckner was not a creditor with any privilege on any of the property of the Morgan succession. This was a grievous error. The record of the judgment for over $40,000, bearing by its terms lien and privilege on all that portion of the succession of Morgan that went to the deceased minor Kelham heir, is here and cannot be impeached. His statement that he was judgment creditor is

true in every particular, yet it has been made the ground for denying him any credit either as a creditor or as a witness. The partition proceeding instituted by Morgan was but a trick to use the forms of law to rob the heirs of Ann Kelham to confer a share of that inheritance on the heirs of Julia Morgan; yet Buckner, now one of the heirs, stands denied by the decree in the case on appeal with every right to assert any claim as heir. It was *his* money and energy that changed the Melbourne plantation from a desert into an asset of chief value in the succession of Morgan, yet he stands denied the right to even stand as a common creditor of the succession for the money he has expended; and the heirs of Julia Morgan, in whose interest the Kelham heirs were bereaved of a large portion of their inheritance from Narcisse Deeson, claim all of the other assets of the succession under an alleged deed of gift of the man who, through partition proceedings, attempted to turn the Kelham's real estate into a barren credit in order that he might discriminate against the Kelham heirs. The claim now is, that even that credit into which their real estate was turned should be denied the complainants.

The situation would have been without complication if the original decree on the creditor's bill had simply set aside the probate sale and sent the property back, where the law consigned it, into the mass of the succession, to be administered as the law of Louisiana imperatively demands it shall be administered, by the probate court acting *in rem*. We should not have the spectacle of a master in ordinary sitting as a probate court in proceedings in which there is no executor or administrator of the succession of Morgan acting in administration; the only administrator standing in court and acting for the succession being the administrator of *a dead, unsecured creditor* of the succession attempting to convert all of the assets of the succession he is assailing to the profit of the succession in whose interest he makes the assault. It is the heirs and creditors of *Morgan*, against the

administrator of Gay, with a receiver in possession, holding *for the estate of Gay*, with the administrator of Gay pledged to cut off all the rights of other creditors of the Morgan succession if he can.

It is dificult to understand how the circuit court justified a decree cutting off the right and privilege of the Kelham branch of heirs, securing the payment of the share of the price of the sale of the community rights of Narcisse Deeson, wife of O. J. Morgan, retained in Morgan's hand without their consent (the $67,495.60). It was to bear mortgage privilege both by operation of law and by the terms of the decree in the partition proceedings. It had not been prescribed; at the death of Morgan it could not prescribe as against the minors in whom it has been vested, with scarce an interval, since the death of Morgan. It *has not been paid.* It is idle to say that the lien was not recorded. Even if the recording was necessary while the succession of A. J. Morgan is open, as it still is open, and the property in contemplation of law in *posessio legis*, held by the probate court of the parish in which it is situated for the record of the title deed by the court to Morgan in the partition proceeding, by which it is claimed he absorbed by title the estate of his deceased wife, could not be made without a complete record of the privilege in favor of the Kelham heirs, and without a recital of all of the facts out of which the debt and privilege arose. It certainly cannot be the office of equity to subordinate this right, given both by law and convention, to the clamorous demands of the holder of unsecured bills of exchange, made years after the debt to the minors was a fixed fact both by operation of law and by solemn covenant of the drawer of the bills.

We respectfully submit that the decree appealed from should be reversed, and if the entire property is not sent back to the probate court for administration, and the succession of Morgan, unrepresented as it is, must be settled in a contest with the administrator of a hostile succession (the administrator of Gay), there should be a decree that will save to the complainants those rights

that would not and could not be questioned if the estate was in the possession and under the administration of the only court in the State of Louisiana having probate jurisdiction over the estates of the dead or the interests of minor heirs in successions.

J. R. BECKWITH,

Counsel for the Complainant,

J. A. Buckner, and Etheline Buckner, Minor.

Office Supreme Court U. S.
FILED.
NOV 22 1889
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

STEPHENSON WATERS, Administrator of WILLIAM GUY, Deceased, Appellant,
vs.
JOHN A. BUCKNER *et al.*, Appellees.
No. 135.

JOHN A. BUCKNER *et al.*, Appellants,
vs.
STEPHENSON WATERS, Administrator of WILLIAM GUY, Deceased, Appellee.
No. 269.

Supplemental Brief for the Heirs of Julia Morgan, Appellees in Suit No. 135, and Appellants in Suit No. 269.

It is urged that the act of donation and sale is not a sale in part, but a giving in payment which requires delivery to perfect it.

If that were so, the authentic or public act by which the donation and sale is evidenced amounts in law to delivery.

Article 2478 of the Civil Code provides as follows:

"The law considers the tradition or delivery of immovables as always accompanying the public act which

transfers the property. Every obstacle which the seller afterward interposes to prevent the taking of corporal possession by the buyer is considered as a trespass."

In the case of Brown, administrator, *vs.* Brown (30 La. An., 968), the court say, "we are aware that in the case of Schultz *vs.* Morgan Chaffee & Bro., intervenors, reported in 27 An., 618, Justice Taliaferro, as the organ of the court, seems to deny the application of this rule to transfers of immovables by authentic act by way of *dation en paiement.* He says that it is of the very essence of the *dation en paiement* that delivery should be *actually* made," and cites as authority 3 M., 226–269, 12 L., 375, 3 A., 280 and 20 A., 282.

Article 2656 is as follows:

"The giving in payment differs from the ordinary contract of sale in this, that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving in payment is made only by delivery."

Justice Taliaferro interpolates the word *actual,* which is not found in the text of the article. What constitutes delivery must be determined by reference to other provisions of the code. The language of the court in 27 A. would be substantially correct when applied to immovables transferred by *private* act, or to movables; but we have seen that—

"The delivery of immovables is always considered as accompanying the *public* act *transferring* them, whether that *act* be a sale or *dation en paiement.* By reference to the cases cited as authority by the court, to wit, 3 M., 226–269, 12 La., 375, and 20 A., 282, it will be seen they were all cases relating to movables. The case in 3 A., 280, is not in point. It may be added that it is not very apparent whether the acts in question in the case in 27 A. above referred to were public or *sous seign privé.* But,

so far as the dictum of that case is applicable to *public acts transferring immovables*, whether they be sales or *dations en paiement*, we can not give it our assent."

After the establishment of the usufruct, by the act of sale and donation, the vendor retained possession as *usufructuary*, and his possession became the possession of Julia Morgan, the naked owner, to whom the property was transferred. Demolombe tells us that the usufructuary is a precarious possessor; that is to say, he holds like a tenant for the owners. He further says that in reality it is always the naked owner who alone has the civil possession, through the ministry of the usufructuary. In fact, the naked owner is the real owner, the usufruct being merely an incorporeal right. (Demolombe, p. 187, No. 218.)

The Louisiana code, art. 537, says: "Usufruct is an incorporeal thing, because it consists in a right."

Respectfully submitted.

THOS. J. SEMMES,
Of Counsel for Julia Morgan's Heirs.

FILED
NOV 25 1889

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889

No. 135.

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED, APPELLANT,

vs.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER; NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR; NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLANTS,

vs.

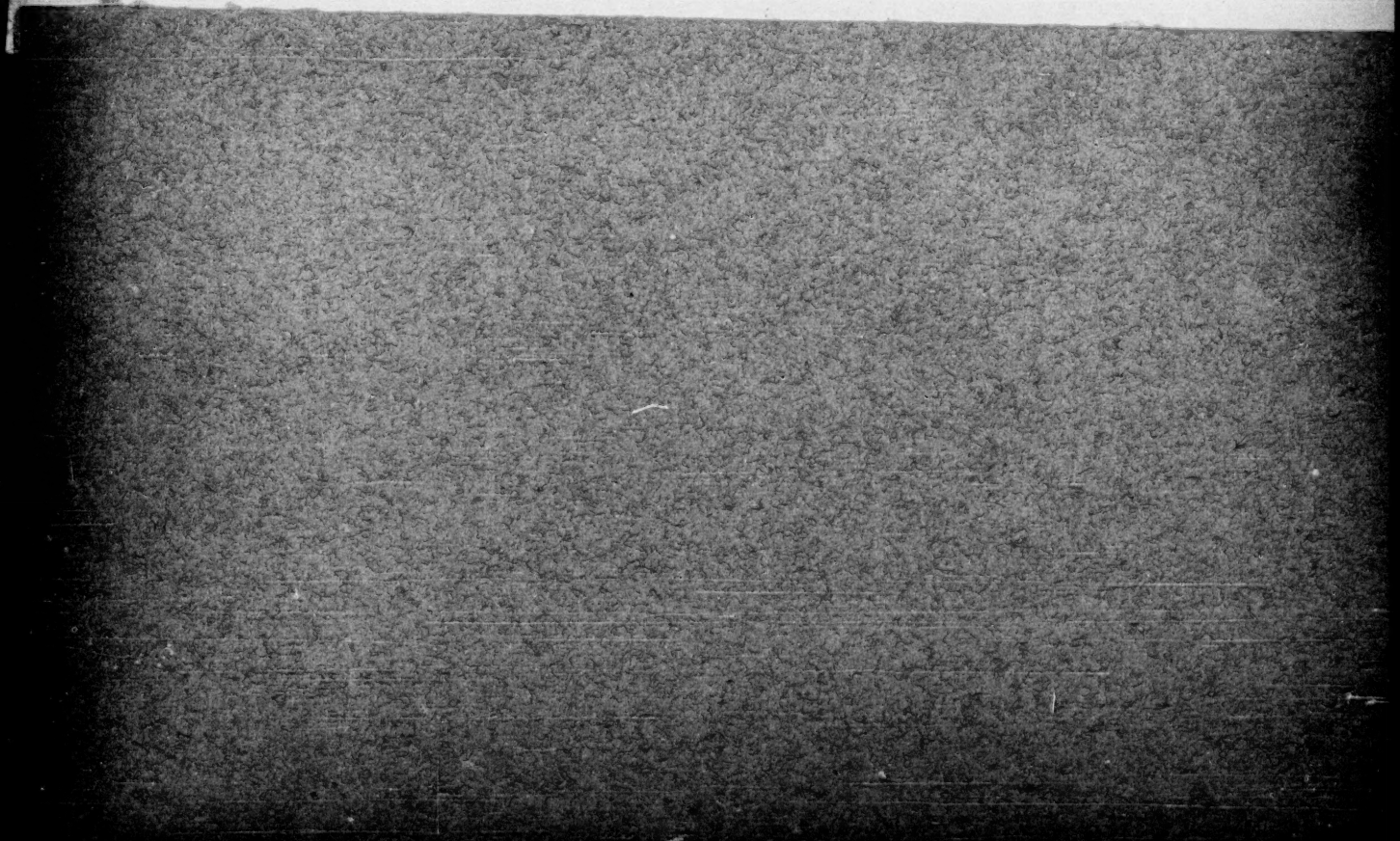
STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR THE CREDITORS.

JNO. T. LUDELING,
Counsel.

JUDD & DETWEILER, PRINTERS.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889

No. 135.

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED, APPELLANT,

vs.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER; NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR; NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLANTS,

vs.

STEPHENSON WATERS, ADMINISTRATOR OF WILLIAM GAY, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR THE CREDITORS.

The pleadings and facts and errors complained of on both sides in these cases have already been substantially stated in the briefs on file.

The purpose of this brief is to call the attention of the Court to a few facts, and to try to answer the positions assumed by counsel for Narcissa and Julia H. Johnson, and also those maintained by counsel for Buckner and his child in so far as they antagonize the rights of creditors.

I. The rights of Narcissa K. Johnson and Julia H. Johnson will be considered first.

They are the children and heirs of *Julia Morgan*, one of the two daughters of Oliver J. Morgan, whose estate they inherited.

Julia Morgan, wife of Oliver T. Morgan, *died* in May, 1860. (See testimony of Narcissa Johnson, Record, p. 91.)

Oliver J. Morgan died in 1860.

Narcissa Johnson was born in 1847, so that she was of age when the judicial sale took place, in 1869.

From the testimony of Bucker and others it is shown that these lands have been in the occupancy and under the control of the *heirs* of O. J. Morgan. They have lived upon them and exercised acts of ownership over them from the death of O. J. Morgan till about 1884, when they were taken from the heirs by the receiver appointed in this case. (See pp. 193, 194, 195.)

Telford says:

"In February, 1873, witness came to Wilton plantation as manager and agent for Matt. F. Johnson, and the contracts witness made with the laborers were in the name of Matt. F. Johnson, tutor for the minor children of Julia Morgan. Witness had charge of Wilton and Albion plantations in his aforesaid capacity during 1873, 1874, and 1875. Witness says H. Goodrich was the manager and agent of said plantations prior to his taking charge of the same, and controlled them in behalf of the same principals, and that J. W. Erwin succeeded witness as manager of said plantations, Wilton and Albion, acting in behalf of the same principals."

Record, pp. 202 and 203 of exhibit.

Telford says:

"That while he was in charge of the property (Wilton and Albion) Oliver T. Morgan never received any of the rents, but they were always received and controlled by Matt. F. Johnson. Witness states that from the time he has known Wilton and Albion plantations until the present day Col. Matt. F. Johnson has controlled and disposed of the property and exercised all rights of ownership over them."

Record, p. 204 of exhibit.

Buckner testified as follows:

"Witness states that Thibetts paid him $3,000 for the rent of Melbourne in 1866; don't know how much he paid Matt. F. Johnson for Wilton, but that the rent was coming to Matt. F. Johnson from Thibetts according to the contract. * * * Matt. F. Johnson has had possession of *Wilton and Albion ever since the war*, and has controlled them, through his agents or lessees, until the present time. Witness has had control of Melbourne ever since the war, and has controlled it through his agents or lessees; *has always paid the taxes* on *Melbourne*. The *taxes* on *Wilton* and Albion ever *since the war have been paid by* Matt. F. Johnson, through his agents. * * * Since the war Matt. F. Johnson has had the actual control and management of Wilton and Albion plantations, as he, witness, supposed, in interest of his wife, one of the heirs, and the other heir of Julia Morgan. Matt. F. Johnson and the heirs of Julia Morgan have never set up any adverse claim to witness in regard to Melbourne plantation."

Record, p. 209 of exhibit.

"Witness says it was because they claimed three-fourths of the estate. * * * The heirs of Julia Morgan have held possession of the land they had before the war, and witness has held possession of the lands he had before the war. * * * Witness has held possession of Melbourne ever since the war, and the heirs of Julia Morgan have held possession of Wilton and Albion, except that the heirs recognized Oliver T. Morgan as executor, but *he did not require of them any account of the rents and revenues.*"

Record, p. 210 of exhibit.

This honorable Court, in 111 U. S. Reports, after stating the proof as to the rents and revenues of the plantations since the death of O. J. Morgan, says:

"Adding together the amount of the movable estate, the proceeds of the crop of 1860, the sum received from the Government, and the income realized from the landed estate *down to* 1869, the aggregate was possibly not less than $200,000, all of which was first applicable to the payment of the debts due from the estate. But, as the outside debts were not paid, the heirs or executor must have received it. The executor's account is in evidence, and it does not show that the money ever came into his hands, and the proof is very strong that he allowed the heirs *to appropriate it.*"

It is therefore submitted that Mrs. Narcissa Johnson has, by her acts in taking possession of the estate and appropriating the rents and revenues thereof, accepted the succession unconditionally.

"The simple acceptance may be either express or tacit. It is express when the heir *assumes* the quality of heir in an unqualified manner in some authentic or private instrument or in some judicial proceeding. It is tacit when some act is done by the heir which necessarily supposes his intention to accept and which he would have no right to do but in his quality of heir."

C. C., art. 988.

"All those acts of ownership which the person called to the succession can only do in quality of heir suppose necessarily his acceptance, for to act as owner is to make himself heir."

C. C., art. 994.

It is true when the succession of O. J. Morgan was opened, in 1860, these heirs were minors, and the law declares that "the acceptance shall be considered as made for them with benefit of inventory, by operation of law, and shall in no

respects have the force and effect of a formal acceptance." (C. C., art. 977.)

But the code further declares:

"The effect of acceptance *goes back to the day of the opening of the succession.*"

C. C., art. 987.

The proof is conclusive that she and her husband took possession of part of the estate shortly after the war and appropriated the rents and revenues to their own use till 1884, about sixteen years. Her acts of ownership after her majority was a tacit acceptance of the succession. It is submitted that the possession and control of the property of the estate prior to O. T. Oliver's death by Matt. F. Johnson, husband of Narcissa K. Johnson, was the act of his wife, with his authorization, he acting for her, as he had neither interest nor right except through her as an heir, and the nature of his possession thus acquired continued to the end.

All that has been said with reference to Narcissa Johnson is applicable to Julia H. Johnson, with this difference:

Julia H. Johnson was two years old when her mother died, in May, 1860. Therefore she became of age in 1879.

She and her husband possessed and controlled a part of the estate as heirs till 1884.

Matt. F. Johnson testified that he received about $21,800 from the United States Government on account of the estate of O. J. Morgan. He says:

"I used portions of this amount to reimburse me for the losses I had sustained on the property and for my services from 1860 to 1874 as agent of the estate and executor, and in my settlement with George G. Johnson I *settled with him for any remaining amount of the portion coming to his wife, Julia H. Johnson, that was estimated to be in my hands of this amount*, for which I hold the receipt *of Julia H.* and George G. Johnson, dated June, 1879." * * *

Record, p. 95.

George G. Johnson testified that Matt. F. Johnson had possession of Wilton and Albion in 1878 and 1879 and of two-thirds of these places the balance of the time till the receiver took it, in 1884.

"I had possession for my wife of one-third of Albion and Wilton in 1880, 1881, 1882, 1883, and 1884, till the receiver was appointed.

"During the five years that we held part of Wilton and Albion we cultivated it for our own benefit and did not account for the profits or produce to the estate of O. J. Morgan or its representative or to any one else."

Record, p. 100.

He testifies he and his wife received from said lands in five years $5,029.49, less charges for services, taxes, and repairs, $3,866.95, leaving a net return of $1,162.54.

Record, p. 101.

Julia H. Johnson, therefore, is bound as an heir, accepting unconditionally the estate of O. J. Morgan.

II. The claims or rights of the Kellam heir or Buckner heirs will now be examined. The Kellam interest under Morgan's testament is one-fourth of his estate. His son died in September, 1863, leaving his estate to his mother and father and to his two half sisters. John H. Buckner inherited one-fourth. His mother died shortly afterwards, and her estate passed to her children then living, John and Louisa, unless she left a will, so that they owned three-fourths of the Kellam interest. John then died, and the father inherited one-fourth of the three-fourths of the estate and Louisa inherited the remainder. Louisa died in 1883, and her father, John A. Buckner, inherited one-fourth of her estate and three-fourths of it went to Etheline Buckner.

John A. Buckner has accepted the succession by taking possession and controlling the property as owner for himself and his children.

"The effect of the simple acceptance of the succession, whether express or tacit, is such that when made by an heir of age it binds him to the payment of all the debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally and out of his own property, as if he had himself contracted the debts or as if he was the deceased himself, unless before acting as heir he make a true and faithful inventory of the effects of the succession, as herein above established, or has taken the benefit treated of hereafter."

C. C., art. 1013.

"When the qualities of debtor and creditor are united in the same person there arises a confusion of right which extinguishes the obligation."

C. C., art. 2217.

III. The facts above recited, taken from the record and the opinion of this honorable Court in the case reported in 111 U. S. Reports, is a sufficient answer to the appeal of Buckner and his child to this court for equity. During twenty-five years they have enjoyed the rents, revenue, and other benefits of the entire estate of O. J. Morgan, amounting to between $200,000 and $300,000 at the time when the estate was taken from them, and nothing has been paid to his creditors.

IV. Counsel for Buckner complains that this Court erred in saying Buckner had no mortgage or privilege on the property of the estate of Morgan, because he says Buckner had a judgment for $40,000 against the portion of the Morgan property which "went to the deceased minor, Kelham." When the debts of the Morgan estate will have been paid he may execute his judgment against the property which the deceased minor, Kelham, may get, but he never had a mortgage against the property of O. J. Morgan.

V. The counsel for Narcissa and Julia H. Johnson *assumes* that the act of 1858 is valid, at least, until attacked and set

aside, because, he says, it is "*a sale in part* and a *pure donation in part*—the *act is a mixed instrument.*"

What are the *facts?* Is there a sale at all?

The act of 1858 says: "which leaves *a balance due* to *each* of *said heirs* on *account* of the lands, as set forth in the act of partition and sale, the *sum of* $67,495.70. Now, for the purpose of paying to the said Julia Morgan * * * the said sum of $67,495.70, *due as aforesaid, and* at *the same time so to divide the entire estate* of *this appearer* * * * after *paying each of the said heirs in lands,* according to the estimates put upon the portions which may be conveyed to each, this appearer makes this act of sale and donation unto the said Julia Morgan of the *following lands* and for the amounts of the estimated value *beyond the extinguishment of the debts,* to wit, $61,495.07. This act is a donation of the lands hereinafter described unto said Julia Morgan and her heirs forever." Then follows the description of the lands.

It is self-evident that no *money* was paid or promised to be paid as the *consideration* or *price* for the transfer of the lands or of any part thereof, but a *debt* was to be extingushed by the giving of *lands,* no particulr portion of the very large number of acres transferred to Julia Morgan.

"The contract of sale is an agreement by which one gives a *thing* for a *price* in *current money* and the other gives the price in order to have the thing itself. Three things *concur to the perfection of the contract,* to wit: The *thing* sold, the *price,* and the *consent.*" (C. C., art. 2439.)

Here certainly there was no price in *current money,* nor was there any particular *thing* sold.

In Dumford *vs.* Syndic of Brooks, 3 Mart., old series, p. 269, the Louisiana supreme court said:

"The court, in forming their opinion, have not attended so much to the *name* given by the parties as to the *nature* of the transaction itself. If the parties should state that one has *given* to another a piece of ground for a *sum of money* the

court would not call that a *gift*, but a *sale*. So here the parties say that one, being creditor of the other, called on the debtor to demand payment; that the debtor, having no money to give, offered goods in payment, and that the creditor *purchased* the goods. The name of *purchase* does not alter the *nature* of the transaction, such as it appears on the exposition of the facts. The court, therefore, has called it a *dation en paiement*."

The alleged act of *sale*, therefore, was a nullity. It had not a single one of the three essentials to constitute a sale.

As the act of 1858 does not contain *a sale*, there can be no *lesion*, and the discussion of the question is not pertinent in this case.

I respectfully submit that it is immaterial whether the extinguishment of the debt of $67,495.70 mentioned in said act of 1858 be a charge or not. It is admitted that the $9,530.92 was a charge, and that is sufficient reason for the opinion of this court in declaring the act a nullity.

VI. The counsel for Narcissa and Julia H. Johnson has cited a decision of the supreme court in 30 An., 968, to uphold the position that *delivery* follows the authentic act containing a *dation en paiement* or giving in payment. It is submitted that that decision is opposed to the decisions rendered in 3 Mart., 226; 12 La., 375; 20 An., 282, and 27 An., 617. In all these decisions it is broadly stated that in a contract of giving in payment *delivery* is of the *essence* of the contract, whether the thing given be lands or goods. This was the jurisprudence of Louisiana when this act was passed. The court in 30 An., 968, concedes that delivery is essential, but it says *actual* delivery is not essential when the act is authentic, as "the law considers the tradition or delivery of immovables as always accompanying the public act which transfers the property. Every obstacle which the *seller* afterwards interposes to prevent the taking of corporal possession by the *buyer* is considered a trespass." (C. C., art. 2479.)

The following article, 2480, declares:

"In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons the parties must produce proof that they are acting in good faith, and establish *the reality* of the *sale.*"

At best, therefore, article 2479 only creates a presumption that delivery accompanies the public act of immovables.

But in this case the act itself negatives the fact that delivery did accompany the act. The donor declared "he is to retain possession of *all the property herein conveyed and donated,* with the revenues arising therefrom, *until his death.*" (Exhibit, p. 60.)

He subsequently disposed of all this property by testament, which was probated and made executory, and all this property was *inventoried* as O. J. Morgan's, with the acquiesence of all the heirs of the donee. The proof besides is that Judge Morgan remained in possession, exercising acts of ownership till his death.

Counsel in his supplemental brief says: After "the establishment of the usufruct *by the act* of *sale* and *donation* the vendor retained possession as *usufructuary,* and his possession became the possession of Julia Morgan, the naked owner, to whom the property was transferred."

In other words, the very fact which the law declares renders null the act of donation, to wit, reserving the usufruct to himself, counsel contends, makes the donor a precarious possessor for the naked owner. A nullity can produce no effect.

VII. It is respectfully submitted that the act of 1858 is *one* act, an entirety, and indivisible without destroying the intention of the author of it. It is essentially an act *mortis causa.* He never for an instant intended to give up his

lands until *after his death.* As a testament, it is null for want of form; as a donation *inter vivos*, it is null for the reasons already given by this court; as a *sale* in part, it is a nullity, because there is no *price in current money* and no *specific thing* sold; as a *dation en paiement*, it is null for the reason that there was *no delivery* and none was intended to be given till after the death of the debtor, and no *specific thing* was given or designated in the act.

Respectfully submitted,

JNO. T. LUDELING,
Counsel.

Office Supreme Court, U. S.
FILED.
NOV 21 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 135.

DELOS C. MELLEN, *Adm'r*, APPELLANT,

vs.

JOHN A. BUCKNER *et al.*, APPELLEES,

AND

No. 269.

JOHN A. BUCKNER *et al.*, APPELLANTS,

vs.

DELOS C. MELLEN, *Adm'r*, APPELLEE.

APPEAL FROM U. S. CIRCUIT COURT OF LOUISIANA, EASTERN DISTRICT, (CASES CONSOLIDATED.)

ADDITIONAL BRIEF AND ARGUMENT OF Counsel for D. C. Mellen.

This case is a sequel to the case of Johnson *vs.* Waters, 111 U. S., 640, and I beg leave to refer to the statement therein, and to the setting forth of the facts in Mr. Semmes' brief herein, as a far better presentation of the case than I can make, even if time allowed.

In the former case some minor questions were left open for the action of the lower court, from the judgment of which both parties now appeal.

It strikes me, and I submit that the court below has decided erroneously in the following particulars:

1. In not deciding that the Act of March 9, 1858, was intended to be a donation *mortis causa* and not intended to be in anywise a sale.

2. In not deciding that the *intent* of donation on said act was annulled by the *intent* of the last will, which was accepted by all parties, and which covered the same property.

3. In recognizing the complainants as creditors of Oliver J. Morgan's estate, on the basis of their heirships of Narcissa Deeson, and his purchase of her estate in 1858, when he intended, and they understood and agreed, that they were receiving under his will, as they actually did do, his whole fortune, including the very property for which the alleged debt was incurred.

4. In assuming that the parties actually in Johnson *vs.* Waters, did not fully represent all possible issues and interests involved in that suit, and that as to those interests these *quondam* minors were not concluded, so far as William Gay's judgment goes; and in not recognizing and deciding on the plea of *res adjudicata* as to that judgment.

5. In making these minors parties to and under this suit and judgment of the defendant, and distributees and beneficiaries, equally with him, of the fund his judgment produces; and in making them contradict their own averment that they are not represented in the case; also in giving them what they have not sued for, at the expense and out of the pocket of this defendant, who has been allowed no hearing or proof against their claim—thus in so far as it lessens the fruits of his judgment, making him pay without due process of law, a debt he never owed, and one which, if owed at all, is owed by other parties.

6. In not seeing that the question whether William Gay, Oliver J. Morgan, or the executors, tutors and wrongdoers owe these minors, is a judicial question, on which this defendant has had, so far, no hearing.

7. In assuming that there is a Narcissa Deeson estate in this case, when there is not.

8. In assuming that 30 years after O. J. Morgan's death there are two subsisting acts and intents of disposing of his whole estate, *mortis causa*, both acts bearing legal fruits during all that time.

9. In not passing on the defendant's plea that the acceptance of O. J. Morgan's succession without benefit of inventory, made the acceptors, *i. e.*, these parties, or those they represent, responsible for all its debts, including Gay's.

10. In not noticing and passing on the several pleas of estoppel.

11. In not deciding on the plea of prescription.

12. In not distinctly determining, as required by this court, what part of the act of 1858, operates as a sale, and the precise effect of it, in acres or money, so that the judgment can serve as a title.

Oliver J. Morgan had two purposes which he for several years kept in view and never swerved from; and which where his dying commands: 1. To pay his debts; and 2. To give all his property to his direct heirs. He put his whole estate in the hands of his executor, Oliver T. Morgan, his son-in-law, in trust for his creditors and heirs. His voice to his children was: "Here is my princely estate; it is all yours; pay my debts and take it." The law's command was: "It is a trust; pay the debts and take it." Duty and honor said so too.

The amount of debt was probably less than $50,000; it seemed to be merely current debt, to be paid out

of the crop; and in 1860–1 the executor had, available for the debts, in money and personal assets, at least $150,000; but he and the heirs, who seemed to be coadjutors, and finally conspirators, paid no debts, and gave no account of revenues to creditors or court, but became, so to speak, embezzlers and spoliators of the trust funds, until, *by* 1869, *as this court has found, and stated as a fact, at least* $200,000 *had been taken by them from the sacred trust*, of which no dollar was paid on the debt, so far as this record shows; and, moreover, when they were compelled by equity in 1885 to give up the estate and return their spoliations, they had received at least $500,000, which with interest, at the rate they themselves charge, makes their debt to the trust about a million, that must be paid over or accounted for before they can call a dollar of the estate their own.

Now, when equity had caught these parties, and, after a long contest, nullified their fraud of 1869, restored the trust, and ordered accounting and disgorging, it necessarily reverted to the *status quo* of 1861, as the basis and starting-point on and at which to right the wrong, for then it was that the simple doing of duty by the executor would have discharged the debt, and left the estate free for the heirs; and the enforcing of duty and remedying wrong is the very purpose of equity's being!

ONE ESTATE AND ONE INTENT.

But it is best to have before us but one estate—that of Oliver J. Morgan, and but one intention of Morgan—that contained in his last will. This must relieve our adversaries, if not the case, of much of the complication and perplexity of which they complain. For example, in Mr. Semmes' brief, p. 11, it is said that "the action of Oliver J. Morgan" in life, "his repre-

sentatives" since, and "the creditors themselves" have, by their conduct, made "such complications" that the aid of equity is needed to "*unravel the knot* and *adjust the rights* of all parties." Now, I beg leave to say that there was no "complication" or labyrinth in 1861, in the simple matter of handing over trust funds to the *cestui que trust*. I will try now to show that only O. J. Morgan's *estate* and his *intent* belong to this case.

1. As to Narcissa Deeson's estate, I have not been able to see why we should be troubled with it, when it was merged in Oliver J. Morgan's, and absolutely extinguished with its heirships by the judicial sale of January 18, 1858. His living daughter, and the natural tutrix of his other heir, were parties to this sale and its results, and actually agreed or consented to take for their interest their father's promise, which he redeemed by giving them or their children, not long afterwards, his whole fortune, which was manifold payment.

Now if these heirs have any claim, it must be against and under O. J. Morgan's estate; and I submit that this court has already settled this point, in the Johnson *vs* Water case, thus:

"Although the sale [of January 18, 1858,] was for cash, no money was paid. Julia Morgan and her husband, Oliver T. Morgan, executed a request that the money coming to her should be left in her father's hands, and Mrs. Kelham acquiesced in the same course, with regard to the share of her infant son, *Thus Oliver J. Morgan became absolute owner of the whole landed property*, but was indebted to" each child, $67,495.70. "A certificate of the sale, signed by the sheriff and O. J. Morgan, was filed in the court as part of the proceedings in the cause, stating the fact that the money was not paid, but remained in O. J. Morgan's hands." [111 U. S., 645.]

"Remained in O. J. Morgan's hands," because the said patriarch had the unlimited confidence of his

children. They knew he lived only for them, was ever their benefactor, and steadily aimed to give them all he had, as he finally did do.

But his faithless and unfilial children took the estate and repudiated his honor, and went at once into a course of spoliation and breach of trust, which they kept up for twenty-five years, until justice, moved by the swindled creditors, pursued them and brought them to the stool of repentance, and the afterthought of seeking the estate (and their heirship) of their grandmother as a subterfuge.

I submit, therefore, that the case does not involve Narcissa Deeson's estate, but solely concerns O. J. Morgan's. All the proceedings of the executors and the heirs, all the fraud and the consequent litigation, have been based on this one estate, which this court holds to include the whole of the five plantations, and the 15,000 acres of land.

2. The second complication and perplexity troubling the complainants results from their persistently setting forth and urging two *intents* of Oliver J. Morgan, in two dispositions *mortis causa*, of his whole estate, which must, on their theory, have run, side by side, both producing legal effects, for twenty-five years. (1) His donation *mortis causa* (for such he intended it to be) of 1858; and (2) His last will *mortis causa* of 1860, which he *intended* should include his whole estate, and which went into effect, was accepted by all, and bore all possible legal fruits,—except those prevented by the adjudged fraud, while the first *intent* (that of 1858) was never acted on, and had no legal effect. Now, I submit, that the testator's *intent* is in this case the subject of quest all the time, and that it is found only in his will, which fixed the *status* of his estate, and the heirships under it. And, moreover, the Act of 1858 was intentionally annulled as a donation *mortis causa*, and as a disposition of the estate, (1) by

the express "*revoking of all former wills* [or dispositions *mortis causa*] *made by me*," so the will reads; and (2) by his disposing, in the said will, of the whole of the *same estate*, to the *same heirs* and in the *same proportions*. If *he intended* (or any heir understood) that the Act of 1858 should survive, and bear legal results, for twenty-five years, there is no evidence of it.

And there is a moral and equitable, if not a legal, presumption that his daughter, Julia, fully approved his last will and testament, because (1) the will was made before her death; (2) as to her it reiterated the previous act; (3) it gave her three quarters of the whole vast estate; (4) her husband was to be executor; (5) everything betokens the utmost confidence and mutual knowledge, between the father and his daughter and her husband.

This court, I submit, must consider the circumstances, and continue its equity. So far, it has given Gay, the principal creditor, judgment for all he claimed. All the present proceeding seems to have been gotten up and engineered, to defeat the court in its purpose of righting wrong and effecting justice!

I beg leave, therefore, (while insisting that this will is in no wise recognitive or confirmatory, as to the act of March 9, 1858). to confine myself to the *one estate* and *one intent* of O. J. Morgan, and pass to

THE STATUS QUO OF 1860–61,

which is what the court must stand on; for its decree orders accounting and settlement on the then existing basis. It gives judgment for the debt as due in 1861, and nullifies as fraud, all proceedings to evade it, finding as a fact—to use it own language—that "*the income realized from the landed estate down to* 1869, *was probably not less than* $200,000, *all of which was first ~~and~~ applicable to the payment of the debts due*

from the estate." The court then says, the heirs or executors must have got it for no doubt were paid. "*The amount they thus appropriated as well as the rental value of the plantations occupied by them before Gen. Morgan's death, was properly chargable against any claim that they had against the estate.* How much they did receive nowhere appears. No credit is given therefore."

So that according to the court's view, if the act of 1858, should be held in any wise, good, *e. g.* as importing a debt of the estate to the heirs, this "rental value" compensates it *pro tanto.*

But I submit that there is a reason (heretofore overlooked), why the debt of $67,000 to each, could not survive the will, as to those who accepted and acted under it, viz: that *the very property was in the estate accepted by them, for which the debt of* $67,000 *was incurred,* thus making the very "confusion" of the civil law, provided for in the Civil Code, Articles 2217–18; 1429.

AS TO THE NON-REPRESENTATION OF THE MINORS.

If I am right in leaving out the Deeson estate, and disregarding any other intent of O. J. Morgan than that of his last will, neither Julia Morgan's heirs nor Kelham's, can complain or stand herein; and we have nothing to do with their representation. But I may say, *en passant*, that the counsel is mistaken in saying, on p. 3 of Mr. Semmes' brief, that "Oliver T. Morgan is not the tutor of his [and wife's] child." The record in Johnson *vs.* Waters, p. 18, shows Morgan's statement to the contrary, and Tilford, p. 202, testifies to the same effect. Presumptively, Morgan represented all his wife's children; and as to young Kelham, this court found that his natural tutrix represented him

effectively, as to the sale of January 18, 1858, and as to leaving the price in the hands of O. J. Morgan as *his debt* to the heir.

Moreover, the law provides tutors and under-tutors for all minors, the latter to see that tutors do their duty, and to represent the interests of minors, if adverse to those of their tutors. Presumptively the law, and these officers of it, have done their duty. But if these *quondam* minors had interests against, or were injured by, their tutors, in wrong-doing or neglect, they could sue within four years after majority. In this case, while the wrong-doing promised success, they said nothing; but when, in 1885, they were defeated, they raised the Deeson ghost, and their own non-representation. One had then been a major for fifteen years, the other for five; and both were cut off by prescription.

In truth, their grievances are all against one another. *E. g.* The Kelham heir got only one-fourth, while Julia Morgan's heirs got three-fourths, and the $67,000 should have been paid to each heirship, before division. Again, if O. T. Morgan did, or sanctioned, spoliation, or embezzlement, or in anywise, acted to the injury of the heirs; or, if he and Buckner *et als*, while defrauding the creditors, damaged the heirs, the remedy is obviously against the doers of the wrong and damage. Intervening herein, implies that, somehow, William Gay and O. J. Morgan have caused the wrongs and losses they complain of.

THE DEBT AND DUTY OF 1861,

are, then, the matter before us. Then O. T. Morgan left the path of rectitude, carrying with him our rights. If society must "avenge me of mine adversary," and remedy my wrongs, I must be restored to the *status quo*. This, may it please the court, is what we plead for. He then had, as a trust for our debt, 2,500 bales

of cotton, besides Westland's crop, which from Montgomery's testimony, in Johnson *vs.* Waters, (Record 251), must have been 1,000 more; also the personal assets, about $40,000; also the right to get, at any moment, the court's order to sell personalty, negroes, or real estate, so far as needed for debts. Moreover, this was only a small, current debt, due after the crop came in, viz, in all January, 1861. The above assets and and means were then all in hand. Everything was in normal condition, the beginning of the war was many months off; everybody was hopeful; and the decline of values, and stringency came on a year or more afterwards.

Our adversaries here aid us, by showing that, at the time of the act of 1858, O. J. Morgan was "not indebted to any one except his children and great-grand child." "Oliver J. Morgan," says the counsel, "was wealthy, and no fraud on creditors could have been intended, because there were no creditors to defraud. (Brief of Mr. Semmes, p. 5.) So it virtually was in 1860–1, the then debt to Gay being comparatively small and seemingly for current expenses, &c., and due three months after the executor began duty.

AS TO THE EVENTS OF 1866 to 1870,

which befell this estate, as testified to in this record, we ask what right had O. T. Morgan *et als*, to carry this unsettled estate across the waste of sad years to 1869? Did they not do it to profit by wrong? and did they not rejoice at the conditions that favored their fraud? We have gone once on the trail of the wrong-doers with this court, which captured them; annulled their fraud, and established, as justice, our decree, based on the *status quo* of 1861. And we beg leave to to stand there, awaiting the result; and ignore the after thoughts, excuses and pretexts, which are dis-

closed in this record, and which are, in no sense, the accounting for and yielding up, of assets, required by the trust and the judgment. The duty of 1861 was alike easy and imperative. "Pay my debts as they fall due," was the voice from the grave. If, on "making haste to be rich," the executor took the wrong path, *we* are not to suffer the adversities thereon. If this court give them weight, the wrong-doer profits by his wrong. He never intended to pay. Even in 1869, with five plantations and 15,000 acres in hand, all unincumbered, it was an easy thing to settle Where is the evidence of trying to do so? of negotiation? of tendering property or mortgage? of a meeting of creditors, &c., &c.? No! every step was on the "new way to pay old debts!" But now they pray for equity, holding up unclean hands, and not taking even the first step to equity!

IN CONCLUSION

I beg leave to make a few explanatory observations, strictly within the record, to elucidate some matters, which forty years of planting, and of dealing professionally with issues between merchants and plantation owners, make clear to me.

1. THE PATRIARCHAL IDEA.

Oliver J. Morgan evidently intended to act the patriarch, and own and control his fifteen thousand acres, and five or more plantations, during life. His children were permissively occupying Melbourne, Westland, etc., and held under him, *e. g.*, his son-in-law, Oliver T. Morgan, had Westland, which, as Montgomery testified, [p. 251, old Record,] was "one of the most valuable, best drained, and most productive places in the parish," the crop being "1000 to 1200 bales." Oliver J. Morgan remained sole owner of all, with ab-

solute *jus disponendi*, the last act of it being his last will. The whole record proves this view, and all the talk of Kelham, Buckner, O. T. Morgan, or anybody else, making improvements that were not O. J. Morgan's, and at his cost, is fanciful. The assertion of the Kelham ownership of Melbourne, has no foundation in the record, and is contradicted thereby.

2. A PLANTATION RUNS AND IMROVES ITSELF,

so to speak, having a *quasi* personality or machine character, especially one of a rich and highly reputable owner. It operates itself and makes its own improvements, speaking figuratively. It hires overseers and labor, buys supplies, mules, etc., raises crops, makes houses, fences, ditches, etc., pays taxes, doctors, lawyers, etc.; and when the witness, Buckner, or one of the other parties herein, speaks of improvements he made, he would, if asked, probably say "the plantation did it all." Its merchant generally pays these expenses, often advancing the money, for the profit of commissions and interest. and of handling the crop. The phrases "my plantation," "my crop," or "my improvements," are often the equivalent of "my engine," said by the man at the throttle valve. It seems to be so in this case.

3. OVERFLOWS.

Alluvion is fertility, which the great river steals from all the mighty west, and spreads over the plantations of its lower valley, and generally improves them thereby. If the deposit be light and even, it fertilizes the land and helps this year's crop, if heavy it raises the land and enhances value in that way, while it does not favor this year's production. In East Carroll the flood generally goes down in time for the usual crop. Back places like Westland, eight miles from the river

and low, lose ther negroes from long submersion, but front places gain them. I explain this because the impression attempted is not entirely correct.

4. AS TO LABOR SUPPLY.

East Carroll has always been full of negroes; and high places like Wilton, Albion, and Melbourne are, if properly managed, always well supplied. Those who commit fraud are generally unjust to labor, and lose it. Fair-dealing and well-managing men, on high plantations, have lacked labor nowhere in Louisiana.

Finally, as William Gay's interest is confined to his debt and the judgment thereon, I submit that his litigation should end here, and that it would be grossly unjust to involve him indefiinitely in the disputes among these heirs, arising in settling the estate.

J. G. Simrall

B. J. SAGE,
J. W. GURLEY, JR.,
Counsel of D. C. Mellen, admr. of the estate of William Gay.

Office Supreme Court U. S.
FILED.
NOV 21 1889
JAMES H. McKENNEY
CLERK.

Supreme Court of the United States.

October Term, 1889.

DELOS C. MELLEN, Adm'r of William Gay,

Appellant,

vs.

JOHN A. BUCKNER, in his Own Right and as Tutor of ETHELINE BUCKNER, a minor, NARCISSA KEENE and MATTHEW F. JOHNSON, her Husband, and JULIA H. MORGAN and GEORGE G. JOHNSON, her Husband,

Appellees.

No. 135.

JOHN A. BUCKNER and Others,

Appellant,

vs.

DELOS C. MELLEN, Adm'r of William Gay,

Appellee.

No. 269.

J. WARD GURLEY, Jr.,
B. J. SAGE,
Counsel of Admr. of Estate of Wm. Gay.

WASHINGTON:
Gibson Bros., Printers and Bookbinders.
1889.

Supreme Court of the United States.

OCTOBER TERM, 1889.

DELOS C. MELLEN, ADM'R OF WILLIAM GAY, APPELLANT,

v.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLEES.

No. 135.

JOHN A. BUCKNER AND OTHERS, APPELLANTS,

v.

DELOS C. MELLEN, ADM'R OF WILLIAM GAY, APPELLEE.

No. 269.

In Johnson *v.* Waters (111 U. S., 640 to 675), decided May 5, 1884, this Court, among other things, decreed, (pages 674–5): I. That the estate of Oliver J. Morgan deceased, therein represented by Matthew F. Johnson, dative executor of the last will of said Oliver J. Morgan, is in-

gan, or they are entitled to one-half of the community property (of O. J. Morgan and his wife, Narcissa Deeson) in conjunction with Julia Morgan's heirs.

And the said Mrs. Narcissa and Julia H. Johnson, in their bill, aver that they are not bound or affected by the said decree in Johnson *v.* Waters (111 U. S.), and they ask to be recognized as entitled to all the property included in the donation of 9th March, 1858, by O. J. Morgan to Julia Morgan, and that if said donation is held invalid then they should be recognized, either as owners of one-half of Narcissa Deeson's succession or as creditors of Oliver J. Morgan for $67,495.60, with interest from 1860, being the price at which O. J. Morgan purchased Julia Morgan's interest in the community property. (Record, pp. 1 to 5 and 17 to 20.)

By agreement, these two suits were consolidated, and Matthew F. Johnson, in his capacity of dative testamentary executor of Oliver J. Morgan, became a party thereto. (Record, p. 31.)

The answers filed by the administrator of Gay to these bills denies that the interests represented by complainants were not represented in the suit of Johnson *v.* Waters, and pleads the decision in that case as conclusive against the claims now set up by complainants, except as to the question whether the succession of Julia Morgan, deceased, is entitled to any portion, and what portion, of the proceeds arising from the sale of said lands under said final decree by virtue of said act of sale and donation of 1858, so far as said act was a sale and not a donation.

Defendant further avers that the complainants are, by their many acts and their acquiescence in the act of others, estopped from claiming any of said lands as their own ; that the complainants were parties to the fraudulent proceedings and sales of 1868 and 1869, annulled by the final decree in

Johnson *v.* Waters; that defendant unearthed and exposed said fraudulent sales, and complainants cannot be permitted to share alike with defendant the fruits of his victory, and to the money demand of the complainants defendant pleads the prescription of 3, 5, and 10 years. (Record, pp. 10 to 16 and 25 to 30.)

The decree of the circuit court dismisses the bills, reserving, however, the right to said complainants, except said Buckner in his own right, to go before the Master appointed in the case of Waters, administrator, *v.* Johnson *et al.*, No. 6612, and prove up as ordinary claim against the estate of Oliver J. Morgan such sums as may be due them on account of the original indebtedness of Oliver J. Morgan to the heirs of Narcissa Deeson, which indebtedness is recognized as originally $134,991.70, provided said complainants shall account for said property, rents, and revenues of the said estate of Oliver J. Morgan as came to their hands as heirs or grantees of said Oliver J. Morgan (Record, p. 104).

From that decree Stephenson Waters, administrator of William Gay, appeals, and the complainants in both side bills have taken a cross appeal.

Since the decree was rendered in the circuit court Stephenson Waters has died and Delos C. Mellen has been appointed administrator of the estate of William Gay, and recently made a party to these proceedings.

Assignment of Errors on the part of the Administrator of Estate of William Gay.

1. The circuit court erred in reserving to the complainants, John A. Buckner, as tutor of his minor child, Etheline Buckner, Narcissa Keene, wife of Matthew F. Johnson, and Julia H. Morgan, wife of George G. Johnson, the right to prove up as ordinary claims against the estate of

Oliver J. Morgan such sums as may be due them on account of the original indebtedness of Oliver J. Morgan to the heirs of Narcissa Deeson, and recognizing that indebtedness as originally $134,991.40.

2. The circuit court erred in not adjudging that the interest asserted by each and all of said complainants in both said bills was represented in said suit No. 6612 of the circuit court, Johnson *v.* Waters in this Court, and reported in 111 U. S., 640.

3. The circuit court erred in not adjudging that the original indebtedness of Oliver J. Morgan to the heirs of Narcissa Deeson was more than compensated and paid and set off.

4. The circuit court erred in not holding that the decree of this court, in Johnson *v.* Waters, has the force and effect of the thing adjudged against the said complainants in these cases, and each of them, and the interests asserted by them.

5. The circuit court erred in not adjudging that the so-called act of donation and sale made to Julia Morgan by Oliver J. Morgan, in 1858, is wholly void.

6. The circuit court erred in not maintaining the plea of the prescription of 10 years to the money demand of the complainants, even if it found that the same had not been fully compensated, paid, and set off.

Argument.

As to the claim of John A. Buckner for himself and for Etheline Buckner as tutor.

This is the Kelham interest.

John A. Buckner, as the legal representative of this interest, was one of the principal actors, if not the chief one, in the fraudulent proceedings and sales of 1868 and 1869.

He, and this interest, was directly before the court in Johnson *v.* Waters, and the decision in that case is certainly *res adjudicata* against him, John A. Buckner, and we submit also against the entire Kelham interest. But as it is contended that Etheline Buckner was not then before the court, and is not bound by the decree in that case, we will review her claim.

Etheline is the daughter of John A. Buckner, by a second marriage, and inherits from her half-sister Louisa, sometimes called Mollie.

In their bill she and her father ask to be recognized and decreed to be the owners of the "Melbourne" plantation, by virtue of the alleged giving and setting apart of said plantation by O. J. Morgan to the Kelhams for their interest in the succession of Narcissa Deeson, or that that interest be recognized as a valid claim against the succession of O. J. Morgan, or that they be recognized as entitled to one-half of the community property in conjunction with Julia Morgan's heirs.

This Court has already exhaustively examined the facts concerning the alleged giving and setting apart to the Kelhams of "Melbourne." (111 U. S., 649 and 653).

And that decision is *res adjudicata* against this claim.

As to their demand to be recognized as having a valid claim against the succession of O. J. Morgan for the Kelham share of the adjudication price at the partion sale in Narcissa Deeson's succession, viz., $67,495.60, the answer is plain: not only that the subject has been fully considered and passed upon by this Court in Johnson *v.* Waters, and that decision is now *res adjudicata* against this pretension, but the reasons given for the conclusion in that case would again compel the same decision if the question could properly be reconsidered (111 U. S., 650 to 652).

If, as the Buckners pray in the third alternative, they

are recognized as entitled to one-half of the community property in conjunction with Julia Morgan's heirs, they can only take *as heirs* what remains after the payment of the debts. Julia Morgan died 1st May, 1860, before her father, Oliver J. Morgan, who died in October, 1860. (Record, pp. 89, 91, 92.) The debt to Gay was contracted in January, 1860. Neither at that time nor since was there any claim recorded against the property of Oliver J. Morgan in favor of Julia Morgan.

NOW, AS TO THE CLAIM OF NARCISSA KEENE, WIFE OF MATTHEW F. JOHNSON, AND JULIA H. MORGAN, WIFE OF GEORGE G. JOHNSON.

These are Julia Morgan's heirs, and the contest relative to this interest seems to be chiefly concentrated on the point "whether the succession of Julia Morgan, deceased, is entitled to any, and what portion, of the proceeds arising from the sale of said lands, by virtue of the act of sale and donation made to her by Oliver J. Morgan in 1858, so far as said act was a sale and not a donation."

That instrument styled an act of donation and sale we contend is utterly void. This Court, in Johnson *v.* Waters, has already declared it to be an onerous donation and subject to the laws applicable to gratuitous donations, and pronounced it to be void on account of the reservation by the donor of the usufruct possession and control. But the Court, while strongly implying that it considered the instrument void *in toto*, yet left open for future discussion the question whether the instrument was good in part as a sale.

The learned counsel for the Julia Morgan heirs now contends that the act is valid in whole as a sale. He treats the act entirely as a sale, and urges that it cannot in any

sense be held to be an onerous donation, because there is no charge imposed on the donee.

Now, the act is either an onerous donation or a giving in payment. It is in no particular a sale.

It is an onerous donation, because there is a charge imposed, namely, to pay the Kelham heir something over $9,000, and the further charge not to claim the debt which the donor owed the donee.

But admitting for the sake of argument that the latter is not such a charge as the law contemplates, it cannot be denied that the other is such a charge, and this charge being so light in comparison with the value of the property donated, the act becomes more fully subject to the laws governing purely gratuitous donations, and for this reason is void, the donor having reserved to himself the usufruct possession and control of the property until his death. But if the act is not a donation, then we ask, what is it?

And in order to answer this question let us inquire into the distinction drawn by our law between a sale and a giving-in-payment, or what is known in the French law as a *d'ation-en-paiement.* Art. 2439, La Civil Code, defines a sale: "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.

"Three circumstances concur to the perfection of the contract, to wit: the thing sold, the price, and the consent."

And Art. 2655 defines a giving-in-payment, viz: "The giving-in-payment is an act by which a debtor gives a thing to the creditor, who is willing to receive it in payment of a sum which is due." And Art. 2656 describes the difference between the two, viz: "That giving-in-payment differs from the ordinary contract of sale in this: that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving-in-payment is made only by delivery."

The consideration of a sale must be *money* to be paid, and there need not be delivery, as the contract is perfect by the consent of the parties. The consideration of a giving in-payment is a pre-existing debt, and the act is void *if the property transferred is not delivered.* Now, the property mentioned in the act of donation and sale was not delivered; Morgan retained possession of it up to his death. The consideration was the debt Morgan owed his daughter.

It is therefore clear that the act was not a sale, but a giving-in-payment, and void for want of delivery of the property.

A *dation-en-paiement* of the property, unaccompanied by its delivery, is void. (30 La A., 1114, Quezrouze & Bois *v.* Thibodeaux.)

It is not good as a sale in part, for the further reason that there is no description or designation of the particular part intended to be sold. Whether an undivided interest in all the plantations, or a particular one, or a portion of one of them was intended, it is impossible to determine, and no designation can now be made.

The question of compensation and set-off and appropriation by the heirs of the use of and revenues of the property of the succession of Oliver J. Morgan has already been recognized by this Court, and is fully set forth in the fact cited in Johnson *v.* Waters (111 U. S.)

PRESCRIPTION.

The plea of prescription against the money demand of the complainants should be maintained. "In general, all personal actions, except those before enumerated, are prescribed by ten years." La. Civil Code, art. 3544, the actions

excepted are all prescribed by a shorter time, as will appear from the preceding articles—3,534 to 3,544. The action arose in 1858, when Oliver J. Morgan purchased at the partition sale. The heirs were then Julia Morgan, wife of Oliver T. Morgan, and Oliver H. Kelham, Jr., represented by his mother, Mrs. Melinda Kelham (111 U. S., 644 and 645). John A. Buckner married Mrs. Melinda Kelham, April 7, 1859 (Record p. 68), and at the time of the death of Oliver J. Morgan, October 24, 1866 (Record, p. 89), John A. Buckner was therefore co-tutor with his wife of Oliver H. Kelham, Jr. Mrs. Melinda Kelham, wife of John A. Buckner, died in Sept., 1863, and her son, Oliver H. Kelham, Jr., died in the same month at the age of seven years. Buckner married again, May 19, 1866, and on January 13, 1872, his daughter, Etheline, by the second marriage, was born. Etheline claims through her half-sister, Louisa, sometimes called Mollie, Buckner's daughter by his marriage with Mrs. Kelham. Louisa (or Mollie) died in March, 1883, at the age of 21 years and six months. (Record, p. 68.) Thus the Kelham interest could always have been judicially asserted, as indeed it was by John A. Buckner in 1868 for another purpose.

"The tutor shall have the care of the person of the minor, and shall represent him in all civil acts. He shall administer his estate as a prudent administrator would do, and shall be responsible for all damages resulting from a bad administration. He cannot either personally, or by means of a third person, purchase, lease, or hire the property of the minor, or accept the assignment of any right or claim against his ward" (La. Civil Code, Art. 337).

"The tutor administers by himself alone; all instruments are made by him and in his name, without the concurrence of the minor.

"He can, on his own responsibility, act by an attorney in fact in places distant from his residence" (C. C., Art. 351).

So it was with the Julia Morgan interest. She did not die till May, 1860. Her daughter Narcissa was then 13 years old and her daughter Julia H. was 2 years old, but their father, Oliver T. Morgan, their natural tutor, did not die till August 19, 1873. Narcissa married Matthew F. Johnson 27th December, 1860, and Julia H. married Geo. G. Johnson 1st January, 1878 (Record, pp. 91 and 99).

The bills by which these money demands were first made were not filed till July 10, 1884 (Record, pp. 1 and 17).

ESTOPPEL.

In 1860, when Oliver J. Morgan died, his heirs availed themselves of his will as far as it was in their favor, and caused an inventory of his estate to be made, which includes all the lands now involved in this suit. The value then placed on the estate being—lands, $947,153.80; slaves, $196-961; movable property, $38,200; total, $1,182,314.80 (111 U. S., 650).

Oliver T. Morgan, the executor under the will, and the heirs were then in possession and so remained.

In 1868 Buckner and the Kelham interest and Oliver T. Morgan, for the Julia Morgan interest, instituted the proceedings which resulted in the sales of 1869, annulled in Johnson *v.* Waters as fraudulent. From 1860 to 1869 revenues to about $200,000 were realized from the estate (111 U. S., 650), and went into the hands of the executor and heirs, and remain unaccounted for. Buckner bid in some of the property at the sale made in the succession of Oliver J. Morgan as the property of Oliver J. Morgan.

The Kelham heirs and Buckners were continuously in possession of "Melbourne," enjoying the revenues thereof without accounting therefor, until the receiver took possession. Oliver T. Morgan, and afterwards Matthew F. John-

son, had possession of Albion, Wilton, Morgana, and Westland, or portions of them, and the stock and farming utensils. In 1869 Morgana and Westland were turned over to the lawyers in accordance with the fraudulent proceedings and sales instigated and conducted by the heirs (Record, pp. 89 to 102). Julia H. Johnson says (Record, pp. 97 and 98):

"I myself, as one of the heirs, have not had possession of any of the property until the fall of 1879.

"At that time what was supposed to be one-third of the Wilton and Albion plantations was turned over to me and my husband. We remained in possession of this portion until the receiver took possession in 1884."

George G. Johnson (p. 100) testifies to the same effect.

This was a parceling out of the property by the heirs among themselves, and the exercise of ownership, and consequently an acceptance on their part of the succession.

"The simple acceptance may be either expressed or tacit.

"It is express, when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.

"It is tacit, when some act is done by the heir, which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir." (La. Civil Code, Art. 988.)

"On the other hand, there are some acts which, though in reality they are foreign to the succession, nevertheless evidently manifest the will to accept, as for example, if the person, who is called to the succession, possess himself or dispose of effects found in the succession, thinking that they belong to it, he does an act which makes him liable as heir, because his belief that the effects appertained to the succession is sufficient to establish his will to accept." C. C., Art. 992.)

Therefore, instead of being on an equal footing with Gay, both the Kelham and Julia Morgan heirs are liable for his debt if the property of Oliver J. Morgan should be insufficient to satisfy it.

Respectfully submitted.

J. G. Simrall

J. WARD GURLEY, JR.,
B. J. SAGE,
Counsel for Admin. of Est. Wm. Gay.

Office Supreme Court U. S.
FILED.
NOV 25 1889
CLERK.

Supreme Court of the United States.

October Term, 1889.

DELOS C. MELLEN, ADM'R OF WILLIAM GAY,
Appellant,

vs.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND,
Appellees.

No. 135.

JOHN A. BUCKNER AND OTHERS,
Appellant,

vs.

DELOS C. MELLEN, ADM'R OF WILLIAM GAY,
Appellee.

No. 269.

SUPPLEMENTAL BRIEF FOR GAY'S ADM'R.

JNO. G. SIMRALL,
J. WARD GURLEY, JR.,
B. J. SAGE,
Counsel of Admr. of Estate of Wm. Gay.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

Therefore, instead of being on an equal footing with Gay, both the Kelham and Julia Morgan heirs are liable for his debt if the property of Oliver J. Morgan should be insufficient to satisfy it.

Respectfully submitted.

J. G. Simrall

J. WARD GURLEY, JR.,
B. J. SAGE,
Counsel for Admin. of Est. Wm. Gay.

Gibson Supreme Court U. S.
FILED.
NOV 25 1889
CLERK.

Supreme Court of the United States.

October Term, 1889.

DELOS C. MELLEN, ADM'R OF WILLIAM GAY,
Appellant,
vs.
JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND,
Appellees.

No. 135.

JOHN A. BUCKNER AND OTHERS,
Appellant,
vs.
DELOS C. MELLEN, ADM'R OF WILLIAM GAY,
Appellee.

No. 269.

SUPPLEMENTAL BRIEF FOR GAY'S ADM'R.

JNO. G. SIMRALL,
J. WARD GURLEY, JR.,
B. J. SAGE,
Counsel of Admr. of Estate of Wm. Gay.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

Supreme Court of the United States.

OCTOBER TERM, 1889.

DELOS C. MELLEN, ADM'R OF WILLIAM GAY, APPELLANT,

v.

JOHN A. BUCKNER, IN HIS OWN RIGHT AND AS TUTOR OF ETHELINE BUCKNER, A MINOR, NARCISSA KEENE AND MATTHEW F. JOHNSON, HER HUSBAND, AND JULIA H. MORGAN AND GEORGE G. JOHNSON, HER HUSBAND, APPELLEES.

No. 135.

JOHN A. BUCKNER AND OTHERS, APPELLANTS,

v.

DELOS C. MELLEN, ADM'R OF WILLIAM GAY, APPELLEE.

No. 269.

Supplemental Brief for Adm'r of Wm. Gay.

I.

Art. 2478, Civil Code of La., cited by counsel for Julia Morgan's heirs, in support of his contention that the law considers delivery of immovables as always accompanying

the public act which transfers the property, refers to cases where delivery is declared or where the act is silent on the subject. It has no application to this case, for the reason that the act in question contains the following specific and positive stipulations, viz: "It is further understood that the execution of this deed * * * is not to interfere with the rights of this appearer as a usufructuary. He (Oliver J. Morgan) is to retain possession of all the property herein conveyed and donated with the revenues arising therefrom until his death." And the addenda to said act ends thus, "and this act as delivery under it is to take place and effect on the day of my death."

In the case of Brown, admr. *v.* Brown (30 La. An., 968), cited by counsel for heirs of Julia Morgan, the Court, after reviewing all the facts, found, viz., page 969:

"It follows that the rule of article 2656 requiring delivery in *dations en paiment* had been complied with, since that rule applies as well between the parties as others. Moreover the plaintiff's petition alleges without qualification that the 'said Elizabeth A. R. Brown (the transferree), is in possession of and claims to be the owner of said lands, by virtue of said act of sale, etc.' Besides the transfer is not attacked in the petition as *a dation en paiment* inoperative for want of delivery, but as a simulated sale."

That case, therefore, is not an authority in support of the position for which it is cited. Whereas the case of Quezrouse & Bois *v.* Thibodeaux (30 La. An., 1114), heretofore cited by us, and which was decided by the same Court and a month later than Brown *v.* Brown, is directly in point, that *a dation en paiment* of property unaccompanied by its delivery is void; and the similarity of the facts in that case to those in this suit is striking, as will appear from the following quotation from the summing up made by the Court at page 1116, viz:

"Living in the house with his family, all his children, himself the head of the family, a mere paper conveyance would not be such a delivery as is indispensable to the giving in payment; and the stipulation that the entire property should remain in common until the majority of the minors indicates clearly his intention to divest himself of the title and control nominally only, while in reality he would enjoy the benefits of actual ownership, and keep his family with him as he has continued to do."

As to the usufruct reserved by O. J. Morgan being the legal usufruct under the act of 1844, it may be remarked that no such legal right existed in O. J. Morgan at that date, March 9, 1858. It ceased to exist from the moment he became the purchaser of his deceased wife's share of the community at the partition sale on the 18th January, 1858. On the 9th March, 1858, the date of the said act of sale and donation, O. J. Morgan was the absolute and sole owner and possessor of all right, title, and interest in and to said lands. And as we have seen above he retained *all the benefits of actual ownership*, and did not intend the said act of sale and donation to have any effect until his death.

As to the two acts mortis causa.—A presumption arises from the will, and from the acceptance of the estate under the will, that the act of March 9, 1858, was cast aside as waste. This Court has *fixed the fact* that O. J. Morgan had the *whole* estate in himself, under the sale of January 18, 1858, the *whole* to dispose of by will; and that the heirs accepted the *whole* under his will.

And there could have been no recognition of, or act under, the said disposition *mortis causa* of 1858, because it was by its terms only to take effect at his death, so that the instrument must have been supplanted by his last will. Hence the utter absurdity of considering it herein as a liv-

ing and operating act, and the further absurdity of supposing it can possibly operate to cut off or defeat the debts which the donor or testator owned at that time.

MORGAN'S WILL PAID THE DEBT.—Julia Morgan and Kelham's tutrix were parties to the judgment of partition by sale, and consented to Morgan's purchase thereunder, and to his being their debtor for $67,000 each. This condition of things is *res adjudicata* for it is just what this Court holds in 111 U. S., 640.

Payment of this debt comes by their getting, under the will, which they accepted, all the estate of O. J. Morgan, *including the property bought*, this being payment actual, as well as by "confusion." (See brief "additional" for Mellen, p. 87.)

II.

On the question of estoppel and acceptance of the succession we beg to refer to the following additional authorities, viz:

"The renunciation of a succession is not presumed; it must be made expressly by public act," &c. (Civil Code, Art. 1017; 30 La. An., 926, Edwards *v.* Ricks.)

The heir who occupies and controls in his own right property which is inherited accepts the succession tacitly. (21 La. An., 717. Succession, Zeringue.)

The act of partitioning all the property is an acceptance of the succession. (28 La. An., 713. Succession, McCall.)

Civil Code, Art. 1013:

"The effect of the simple acceptance of the succession, whether expressed or tacit, is such that when made by an heir of age, it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally, and out of

his own property, as if he had himself contracted the debts, or as if he was the deceased himself; unless, before acting as heir, he made a true and faithful inventory of the effects of the succession, as here above established, or has taken the benefit treated of hereafter.

"The engagement of the heir who has accepted unconditionally is somewhat different with respect to legacies, as shall be hereafter explained."

See also 39 La. An., 306. Pironi *v.* Riley.

Heirs who accept the succession with benefit of inventory have no right to be put in possession before the administration is closed. (27 La., An., 352, Succession, Linton).

Civil Code, Art. 1054:

"The effect of the benefit of inventory is that it gives the heir the advantage:

"1. Of being discharged from the debts of the succession by abandoning all the effects of the succession to the creditors and legatees;

"2. Of not confounding his own effects with those of the succession, and of preserving against it the right of claiming the debts due him from it."

III.

The act of donation to Julia Morgan—attempted in 1858—has been held void by this Court in the original case of Johnson *v.* Waters (111. U. S. 667).

The question was presented most fully by Judge Campbell in favor of the *Act of Donation.* Yet this Court after an exhaustive examination of the law, as shown by the opinion, held it void. The further presentation of the question by new counsel only serves to demonstrate the correctness of that opinion. We will now assume that this act of donation was void, as properly decided by this Court. Then all the property in controversy passed under

the will of Oliver J. Morgan and belonged to his succession. His heirs took possession and occupied all the realty and appropriated the rents and revenues and personality from 1860, the date of his death, until a receiver was appointed in the original suit at the instance of our client in 1883.

They held this property for over 25 years without paying a single debt. They by said acts accepted the succession and took the property charged with the payment of all said Morgan's debts. Then in 1869, on the joint application of Oliver T. Morgan, the executor of this estate, and the appellant, John A. Buckner, as tutor of his minor child Mollie, all the real estate was sold to pay debts under an order of the probate court in Carroll parish, where the lands were situated. At that sale Buckner bought in the bulk of these lands for himself and the said heirs of Oliver T. Morgan, as proved by him, p. 198, old Record; and they have continued to hold these lands ever since, Buckner's testimony is as follows:

"Witness has held possession of Melbourne ever since the war and the heirs of Julia Morgan have held possession of Wilton and Albion, except that the heirs recognized Oliver T. Morgan as executor, but he did not require of them any account of the rents and revenues. Witness says that his understanding was at the time of the sale of January, 1869, *when he bought in the property for the heirs*, that they were to receive their proportion of the land purchased in witness' name and he was to retain his proportion."

It is undoubted law as conceded by Mr. Semmes in his brief, p. 25, that this Court had jurisdiction to order a sale of this property to pay debts, and that such sale passed a good title to the purchaser. Now we say that the only interest the Buckners and Johnsons could have in said prop-

erty would be under that purchase made by Buckner for their joint benefit.

But, says Mr. Semmes (p. 25), that doctrine don't apply in this case. "Here the sale has been annulled, because of the fraud of the executor who provoked it, and of the purchasers who conspired with the executor in the perpetration of the fraud." Mr. Semmes apparently loses sight of the important fact that neither the Circuit Court nor this Court has held that sale *absolutely void*, but only void as to Gay and the other creditors of Morgan. The Buckners and Johnsons were the beneficiaries of that fraud, as already held by this Court.

Buckner was the purchaser (for himself and heirs) who conspired with the executor, as said by the Court, to defraud the creditors.

And they will not be heard to complain of their own fraud. So that the only interest they have in this property is what they acquired under that sale; and, as decided by the Court, that interest is what remains after the property has been sold to pay the other debts of Morgan.

Now, we say that all these matters are *res adjudicata*, and that the parties to this appeal are concluded by the judgment in the old suit.

What was that suit for? To set aside this sale as fraudulent so far as Wm. Gay and other creditors of Morgan were concerned, and subject the same to the payment of their debts. Who were necessary parties to that suit? Not Morgan's heirs; because they had already been cut off from any interest in this property, under a sale made to pay Morgan's debts in pursuance of the judgment of a Court of competent jurisdiction. And that judgment and sale stand to-day unreversed and in full force, so far as Morgan's heirs are concerned. The sale has only been held void as to the other creditors of Morgan.

It would seem to follow of necessity from this that the only proper parties to that suit were those who were made parties, to wit: Morgan's executor, to give him an opportunity to contest Gay's claim, and the purchasers at that sale to defend their own title. It is true that Buckner bought for himself and the Morgan heirs, and has allowed them to retain possession of part of it, but he took the whole title to himself, and as far as the record shows, we do not believe he has yet undertaken to convey them any interest. And as they are now antagonistic, having employed separate counsel after these new suits were brought by the same attorneys, it looks as though they are unable to agree amongst themselves as to a division of the spoils. At any rate Buckner, as the purchaser, was competent to represent that entire interest in this litigation, either owning the whole title, or standing in equity as a trustee.

IV.

As to Buckner's claim of unprecedented hardship in equity to cut him off, it is sufficient to say:

1st. He was a party to the original suit, and is undoubtedly concluded by that judgment. So that it is idle for counsel to inquire, "How can equity bar Buckner from any individual claim against the succession and be just?"

He has already been barred.

2d. The claim that he made large expenditures upon the Melbourne plantation upon the belief that it was the property of the Kelhams is the merest pretence in the face of the facts developed in this record.

That he expected that it would become their property, and thought that he had secured it to them by the judicial fraud of 1869, there can be no doubt.

But he knew that in 1860 on the death of Oliver J. Morgan this plantation, with the others, had been inventoried as a part of said Morgan's succession. And he further knew that in 1869 he had procured an order of court to sell that plantation as the property of Oliver J. Morgan on his own petition, with that of the executor. So that there is no hardship about it as to him.

The hardship is all on the other side. The hardship consists in Buckner and the Morgan heirs having taken possession of the whole Morgan estate, with cotton and other personalty on hand in 1860, at the date of Morgan's death, amounting, independently of the realty, to nearly $200,000; and the revenues from the five plantations since that time should have been over half a million if properly managed, and yet not one nickel was ever accounted for to any creditors as far as we are advised.

Here it may be proper to call attention to a serious mistake of Buckner or his attorney (pp. 8 and 9). Mr. Beckwith's brief creating the impression that Buckner, individually, has a judgment or claim against the succession of Morgan for over $40,000. Whereas in point of fact it was a judgment against the Kelham succession and not the Morgan succession. In his petition for sale of property to pay debts of Dec., 1868, he claims to be "creditor of O. J. Morgan's estate by judgment of the district court in said parish, styled ——— *v.* ——— No. ——— on the docket as ———." And this Court not finding any such judgment affecting the Morgan estate, refers to it in Johnson *v.* Waters, 111 U. S., 654, as possibly the judgment for partition of 1857. On this Buckner's attorney says the Court is mistaken; that it is the judgment above mentioned to which his petition referred.

A short statement is needed here.

Buckner was married and became co-tutor with the Kel-

ham heir in 1859; was present and accepting the inventory of Melbourne in the succession of O. J. Morgan and knew of Morgan's intention. In 1868, presenting to the Court his account of tutorship after his wife's death, and claiming judgment against the *Kelham succession*, he represents that negroes, mules, horses, implements, and other movable property are all gone, and no active or productive property remained to the estate, and that all that remained was an interest in real estate and a few doubtful notes. The judgment is that his account is approved and homologated, and that he have judgment "against the said tutorship" for $42,450.90 with legal and tacit mortgage on all the property of said tutorship to date from the appointment of said Buckner as tutor of said minor.

Of course this entity called the Kelham estate is an entirely different thing from O. J. Morgan's succession. And yet Buckner's counsel asks in his brief "how can equity explain or justify the absolute cutting off of all of Buckner's rights in this judgment?" which, as we have seen, is against Kelham's estate.

May it please the Court, this claim of Capt. Wm. Gay against the Morgan estate had its origin before the war. We have been seeking to enforce its collection through the Courts for nearly twenty years, and have been resisted by the Morgan heirs at every step. They have brought us to this Court three times on appeal—first on the plea of limitation, which was held bad because the period of the war was not to be taken into account. Then in suit No. 6612, when we had a judgment setting aside their fraudulent sale, and subjecting the property to the payment of our debts, this Court sustained the judgment of the lower Court, directing the property to be applied to pay our debts with Morgan's other debts. And now we have a third time the

same question brought before this Court in another form, in order to circumvent the last judgment approved by this Court.

Since this litigation began Gay has died. Two of his administrators have died, several of his lawyers have died; his debt has grown from near forty to seventy-five thousand dollars, and as the end approaches after twenty years of strife, we witness the astounding spectacle of these defendants coming into Court and asking that if they *can't* be allowed to keep all that they have been so long unlawfully withholding from us, they may, *as a matter of equity*, at least, be allowed to divide with us the fruits of this litigation.

We will make no comment upon the modesty of this request, but, in order to avoid any further trouble in the Court below, will ask this Court, in its opinion, to say that these parties have no rights in this property or standing in Court until after the other creditors of Morgan who have not been outlawed are fully paid.

Respectfully submitted.

JNO. G. SIMRALL,
J. WARD GURLEY, JR.,
B. J. SAGE,
Counsel of Wm. Gay's adm'r.

Supreme Court of the United States.

OCTOBER TERM, 1890.

Nos. 13 and 27.

DELOS C. MELLEN, ADMINISTRATOR OF ESTATE OF WM. GAY,

[13 *versus*

JOHN A. BUCKNER, FOR HIMSELF, AND FOR ESTHELINE BUCKNER, AS TUTOR, AND NARCISSA KEENE, WIFE OF MATTHEW F. JOHNSON, ET ALS.

JOHN A. BUCKNER, FOR HIMSELF, AND FOR ESTHELINE BUCKNER, AS TUTOR, AND NARCISSA KEENE, WIFE OF MATTHEW F. JOHNSON, ET ALS.,

[27 *versus*

DELOS C. MELLEN, ADMINISTRATOR OF ESTATE OF WM. GAY.

PETITION AND BRIEF FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

Delos C. Mellen, administrator of the estate of Wm. Gay, appellant in No. 13, and appellee in No. 27 of the above causes, respectfully represents that there is error in the decree herein rendered on the 30th day of March, 1891, and humbly prays that your Honors will grant him a rehearing.

The grounds of this application are:

1st. The Court erred in retaining the bill of John A. Buckner, *in his own right.*

2d. The Court erred in allowing the Julia Morgan and the Kellam heirs, the absolute right to take in severalty the interest decreed to them respectively in the various plantations.

3d. The Court erred in allowing these heirs, should they elect to demand a division in kind, to take without charge the buildings they erected.

As to the first ground of error :

This we consider a grave error, and we believe that your Honors made it inadvertently, owing to the many complicated questions involved in this cause.

When Oliver H. Kellam, Jr., died, there survived him, as his heirs, his mother, Melinda H. Kellam, then wife of John A. Buckner, and his half-brother and sister, John and Louise (called Mollie). Melinda Kellam died in 1863, leaving as her sole heirs, her children, John and Louise, first named. About a week after his mother's death, John died, and his only heirs were his father, John A. Buckner, and his sister, Louise. Thus, in 1863, the whole of the Kellam interest had become vested in Buckner and his daughter, Louise.

It will thus be seen that when the original suit of Gay vs. Morgan *et als.* was instituted in 1872, Buckner was an heir to the Kellam interest.

Buckner was one of the defendants in said suit of Gay vs. Morgan. The title to the "Melbourne" plantation was at issue, and he was then in possession and claimed to be the owner of that plantation,

Whether in Gay vs. Morgan, Buckner urged his claim to Melbourne as an heir to the Kellam interest, it matters not. He had the opportunity and should then have urged any and all defences he may have had to that suit. In that suit, as in this, Gay and Buckner were both parties opposing each other and the matter at issue between them was the title to "Melbourne".

The parties and the subject matter being the same in that suit as in this, so far as Buckner is concerned, the plea of *res judicata* as to him should have been sustained and his bill in his own right dismissed.

But there is another reason why Buckner should not be allowed any interest in the lands of Oliver J. Morgan, to the prejudice of Gay's estate.

Buckner was the prime mover in, and in fact the originator and concocter of the scheme and combination to defraud all the creditors of Oliver J. Morgan, which resulted in the fraudulent sales of "Melbourne" and the other plantations to himself and others, to set aside which Gay was forced into a long, tedious and costly litigation.

While the minor whom he represented perhaps should not be bound by his acts, surely he should be estopped from claiming any preference over, or an equality with the creditors whom he thus sought to defraud.

If he has any claim to Melbourne it should be subordinated to the claims of the creditors of Oliver J. Morgan.

2d. *As to the second ground of error :*

The various plantations may not be susceptible of a division in kind without great injury to the creditors. It seems to us that your Honors should have decreed that if the plantations could not be divided in kind, with justice to all parties, then they should be sold in order to effect the partition.

3d. *As to the third ground of error :*

Your Honors increased the interest of the Julia Morgan heirs in "Westland," "Albion," "Morgana" and "Wilton" from twenty-five per cent. to forty-five per cent. and the interest of the Kellam heirs in Melbourne, from forty-three per cent. to fifty per cent. and we understand from the opinion that this increase was made to cover any possible difference there might have been between the costs of keeping up and rehabilitating the plantations and the rev-